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By A. C. FREEMAN,  
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

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# AMERICAN STATE REPORTS.

VOL. LXXXIV.

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# SCHEDULE

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**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**CALIFORNIA.**

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**SCHROEDER v. IMPERIAL INSURANCE COMPANY.**

[132 Cal. 18, 63 Pac. 1074.]

**INSURANCE—CONSTRUCTION OF.**—A contract of insurance is to be interpreted by the same rules as are other contracts, so as to give effect to the mutual intention of the parties. This intention is to be deduced, if possible, from the language of the contract.

**INSURANCE—CONDITION AGAINST FORECLOSURE—KNOWLEDGE OF INSURED.**—A condition that a policy shall be void “unless otherwise provided by agreement indorsed thereon or added thereto, if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed,” is directed to the fact of knowledge on the part of the insured of the commencement of foreclosure proceedings, and not to the time that he may obtain such knowledge. The reasonable construction to be given to the clause is, that whenever he shall have knowledge of the proceedings, and not before, and shall fail to obtain the consent of the insurer thereto, the policy shall be avoided.

Chickering, Thomas & Gregory, for the appellant.

Van Ness & Redman, for the respondent.

**18 HARRISON, J:** Action upon a policy of fire insurance. The plaintiff's right of recovery depends upon the construction to be given to the following clause in the policy: “This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, . . . if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy, by **19** virtue of any mortgage or trust deed.” The policy was issued

November 6, 1893, for the term of three years. At that time the dwelling-house, which was a portion of the insured property, together with the land upon which it stood, was subject to the lien of a mortgage, and on April 30, 1895, the mortgagee commenced an action for its foreclosure, and made the insured one of the defendants therein. The insured and the other defendants were duly served with process in the action, and on May 18, 1895, a judgment was rendered therein for the amount of the mortgage debt, and directing a sale of the property in satisfaction thereof. Under this judgment the property was sold, June 15, 1895, to the plaintiff in the action. The dwelling-house was destroyed by fire, November 15, 1895. The insured gave no notice of the foreclosure proceedings to the defendant, nor did the defendant have any knowledge thereof until after the property was destroyed. The superior court held that the above clause did not have the effect to avoid the policy, unless the insured had knowledge of the foreclosure proceedings before or at the time of their commencement, and that as it does not appear herein that she had any knowledge thereof until the service upon her of the process in the action, the policy remained unaffected by the proceedings. Judgment was therefore rendered in favor of the plaintiff, and the defendant has appealed.

A contract of insurance is to be interpreted by the same rules as are other contracts, and is to be so interpreted as to give effect to the mutual intention of the parties; and this intention is to be deduced, if possible, from the language of the contract: Civ. Code, secs. 1635, 1636; *Wells, Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 397; *Yoch v. Home Mutual Ins. Co.*, 111 Cal. 503, 44 Pac. 189. The above clause in the policy is included in that portion which enumerates many grounds for avoiding it, and it is manifest that the parties intended by these several clauses to agree that the defendant should not be liable upon the policy in case the risk that it assumed should be thereafter increased, unless its consent to such increased risk should be indorsed upon the policy. The provision above quoted is directed to the fact of knowledge, on the part of the insured, of the commencement of foreclosure proceedings, and not to the time at which he may obtain such knowledge, and the reasonable construction to be given to the clause is, that whenever he shall have knowledge of the proceedings, and shall fail to <sup>20</sup> obtain the consent of the insurer thereto, the policy shall be avoided. That the risk assumed at the date of

the policy would be increased by foreclosure proceedings against the insured property, was a fact well recognized in matters of insurance, and it has been held that a proviso in the policy that it shall be avoided by the commencement of foreclosure proceedings has that effect, even though the insured is ignorant thereof: *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Meadows v. Hawkeye Ins. Co.*, 62 Iowa, 387, 17 N. W. 600. It was, doubtless, for the purpose of overcoming the harshness of this rule that the standard form of policy limits this effect to those proceedings of which the insured has knowledge. This limitation is for the benefit of the insured, and that he may have an opportunity to obtain the consent of the insurer to the increased risk and pay an additional premium therefor, if it shall be demanded. The object of the clause is to provide against an increase of the risk, but such increased risk would not be varied by the knowledge or ignorance of the insured, and it may be assumed that the parties deemed it just that the insured should have an opportunity to procure the consent of the insurer thereto, and therefore provided that the policy should not be forfeited if the proceedings were had without his knowledge.

It would be a solecism to speak of the insured having "knowledge" of proceedings yet to take place. He might be informed of the purpose of the mortgagee to commence proceedings, and he might have a belief that they would be commenced, but this information or belief could not be termed his "knowledge" of their commencement. It is equally unreasonable to assume that the parties intended by this clause to limit the provision avoiding the policy to proceedings of which the insured has knowledge at the identical moment of their commencement. These views find support in *Quinlan v. Providence etc. Ins. Co.*, 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; *Woodside Brewing Co. v. Pacific Fire Ins. Co.*, 11 N. Y. App. Div. 68, 42 N. Y. Supp. 620; *Gibson Electric Co. v. Liverpool etc. Ins. Co.*, 10 N. Y. App. Div. 225, 41 N. Y. Supp. 675; affirmed, 159 N. Y. 418, 54 N. E. 23; *Norris v. Hartford Ins. Co.*, 55 S. C. 450, 74 Am. St. Rep. 765, 33 S. E. 566; *Merchants' Ins. Co. v. Brown*, 77 Md. 79, 25 Atl. 992.

A contrary construction was given by the supreme court of Idaho, in *Bellevue Roller Co. v. London etc. Fire Ins. Co.*, 39 <sup>21</sup> Pac. 196; but the reasoning of the court thereon does not commend itself to our judgment. It urges, in support of its conclusion, that it would not be a reasonable construction of the clause to so construe it as to require a party to give notice



of a fact of which he has no information or knowledge; but as the clause makes no provision requiring any notice to be given to the insurer, the reason thus given is inapplicable. The policy merely provides that it shall be avoided if the consent of the insurer is not obtained. The case in Idaho was cited in one of the district courts of appeals in Texas (*North British etc. Ins. Co. v. Freeman*, 33 S. W. 1091), but the decision therein does not appear to have rested upon this authority. In another district court of the same state the clause seems to have received a different construction: *Hartford Fire Ins. Co. v. Clayton*, 17 Tex. Civ. App. 744, 43 S. W. 910.

The judgment is reversed, and the court is directed to render judgment in favor of the defendant upon the facts stipulated by the parties.

Garoutte, J., and Van Dyke, J., concurred.

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**Fire Insurance.**—Notice of foreclosure proceedings, as avoiding insurance contracts, is discussed in *Springfield Steam Laundry Co. v. Traders' Ins. Co.*, 151 Mo. 90, 74 Am. St. Rep. 521, 52 S. W. 238; *Norris v. Hartford Fire Ins. Co.*, 55 S. C. 450, 74 Am. St. Rep. 765, 33 S. E. 566.

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## MCGREW v. MUTUAL LIFE INSURANCE COMPANY.

[132 Cal. 85, 64 Pac. 103.]

**MARRIAGE AND DIVORCE—FOREIGN JUDGMENT—COMITY.**—A valid decree rendered in a foreign country, permitting the guardian of an incompetent husband to maintain an action for divorce against his wife, must, by comity, be given full force and effect in the courts of this country.

**MARRIAGE AND DIVORCE—CONSTRUCTION OF FOREIGN STATUTE.**—The construction given by the courts of a foreign country to a statute thereof permitting an action for divorce to be maintained by the guardian of an incompetent person cannot be assailed to defeat a judgment of divorce granted thereunder.

**MARRIAGE AND DIVORCE—FOREIGN STATUTE FORFEITING PROPERTY RIGHTS.**—A statute of a foreign country declaring that if divorce is decreed for the adultery of a wife her husband shall hold her separate estate forever, has no operation until the entry of the judgment of divorce.

**MARRIAGE AND DIVORCE—FOREIGN DECREE—EFFECT ON PROPERTY RIGHTS—DOMICILE OF WIFE.**—Although a wife may be bound by a decree of divorce rendered in a foreign country, yet if such decree does not purport to determine any property rights, and she is domiciled in another country



prior to its rendition and entry, a statute of such foreign country declaring a forfeiture of her personal property to her husband does not operate in the country of her domicile to forfeit to her husband a policy of insurance payable to her, and at the time of the decree governed by the law of her domicile.

**DOMICILE—PROPERTY RIGHTS.**—The law of the domicile governs the ownership and right to personal property.

**MARRIAGE AND DIVORCE—DOMICILE OF WIFE.**—If a husband discards his wife by instituting proceedings for divorce, the theoretical unity of husband and wife is dissolved, her domicile ceases to be that of the husband, and she may acquire another and separate domicile by a change of residence.

**ACTIONS—EVIDENCE OF PAYMENT AS DEFENSE.**—In an action by a divorced wife to recover upon a policy of insurance payable to her, it is no defense that the insurer has paid a judgment recovered against him by the administrator of her deceased husband upon the same policy, and evidence of such payment is properly excluded.

Chickering, Thomas & Gregory and E. L. Short, for the appellant.

Platt & Bayne, for the respondent.

**87** **McFARLAND, J.** Action on a life insurance policy. Judgment was for plaintiff in the court below, and from the judgment defendant appealed.

The respondent is a resident of California, where this action was commenced, and the appellant is a resident of the state of New York. The defense is rather a remarkable one; it rests upon a decree of divorce rendered by a court of the Republic of Hawaii in an action brought there against the present respondent by the guardian of her husband—a decree which could not have been obtained here—and upon a Hawaiian statute which has no force here, except by comity.

The material facts in the case are these: On September 14, **88** 1892, the respondent was the wife of one Henri G. McGrew, and she and her husband were then residing and domiciled in Honolulu, Hawaiian Islands. On that day the policy of insurance sued on was executed, by which defendant promised to pay five thousand dollars to the respondent herein, Alphonsine McGrew, upon the death of her husband, Henri, provided that she should be living at the time of such death. Henri died on the twenty-second day of October, 1894, leaving the respondent, his wife, surviving him. In 1893, Henri and respondent made a trip to California for the benefit of the health of the former; and in the latter part of December, 1893, they returned to Honolulu, he being then in a very feeble mental

condition from softening of the brain. When they landed at Honolulu they were met by one Carter, who assumed control over them, and ordered them not to go to the home in which they had been living, but to go to a hotel. It appears that soon afterward Carter was the legally appointed guardian of the person and estate of Henri, who had then been judicially declared to be non compos mentis; but it does not appear when he became such guardian. A few days after respondent and her husband went to the hotel, Henri was removed by Carter from the hotel to a hospital. Respondent wanted to go back to the home where they had formerly lived, but Carter, who had the key and control of the house, would not let her, and he sold all the furniture in it, except a piano, which plaintiff claimed as her own. Carter would not furnish her a home or any money, and Henri was an imbecile, incapable of understanding the situation. On February 8, 1894, Carter, as guardian of Henri, brought an action on behalf of the latter to obtain a divorce from respondent, alleging adultery as the ground of divorce. Service of process was served on respondent in Honolulu, and she appeared in the action by an attorney, and filed a demurrer, and afterward an answer denying the charge. On April 5, 1894, respondent left the Hawaiian Islands, with the intention of not returning there again, but intending to come to California and make her home here. She obtained the funds to pay the expense of the journey by the sale of her piano. She said that she came to California to make her home here, and also through fear that "they" would take her infant child away from her. She arrived here in the same month—April, 1894—and has since then constantly resided in California, intending it as her place of residence. <sup>89</sup> On August 25, 1894, the Hawaiian court entered a decree of divorce in the said action brought by Carter, dissolving the bonds of matrimony between this respondent and the said Henri (and it is not improper to say that the evidence in the case was conflicting). There was nothing in the pleadings in said case about property, and the decree was simply one of divorce, without any disposition of any other matter whatever. But there is, and at that time was, a statute of Hawaii which declares that "when a divorce is decreed for the adultery, or other offense amounting thereto, of the wife, the husband shall hold her personal estate forever."

Respondent contends that the judgment in the divorce suit should be held invalid because, in the absence of an express

statute on the subject, an action for a divorce cannot be maintained by a guardian, and there is no such statute in Hawaii—the only one relied on being the general provision that the guardian of an insane person “shall appear for and represent his ward in all legal suits and proceedings, unless where another person is appointed for that purpose”; but, admitting these legal propositions to be correct, the courts of Hawaii have held otherwise, and their construction of the statutes of their own country cannot be here assailed: *McGrew v. McGrew*, 9 Hawaii, 475. Full effect must therefore be given to the judgment in the divorce suit.

It is also contended by respondent that the judgment in the divorce suit was never absolute and final, because certain exceptions taken by defendant's attorney therein have never been disposed of, and it is provided by the Hawaiian statutes that “no order or decree for a divorce shall be made absolute until such exceptions shall have been disposed of.” The transcript contains many things about the law of Hawaii touching the taking of exceptions in a trial court, and having them certified up to the appellate court, which are somewhat difficult to understand; but as the supreme court of that country seems to have held that the judgment in *McGrew v. McGrew*, 9 Hawaii, 475, had become absolute (*Carter v. Insurance Co.*, 10 Hawaii, 117), and as there is no express finding on the subject in the case at bar, we are compelled to hold that the said judgment was final and conclusive as to the matter therein adjudicated.

Under our views of the case, it is not necessary to determine the point made by respondent that the Hawaiian statute has no force here, on the ground of comity, because it is penal, <sup>90</sup> works a forfeiture, and is contrary to the public policy of this state, etc.

As the plaintiff herein was served in Hawaii with process in the divorce suit, and appeared therein by attorney, the court there had jurisdiction, and the judgment therein rendered concludes her as to the one thing adjudicated therein. But the judgment is merely a decree of divorce; it does not deal with any property rights; and if, as claimed by appellant, all the personal property of respondent, including the policy sued on, passed to her husband, that result must have flowed from the said Hawaiian statute providing for the forfeiture of the wife's property, and not from anything decreed in the judgment. It



was not a case where the adjudication by final judgment of property rights asserted in the pleadings relates back to the commencement of the action; for in that case there were no property rights averred, or considered, or adjudicated. The respondent's right to her property was not affected by the mere pendency of the suit for divorce, and the statute had no applicability until the entry of the judgment. The question, therefore, is, What was the right of respondent to the property involved at the time when the said statute could be invoked? And it is clear that if at that time she was domiciled in California, the Hawaiian statute had no operation upon her or her personal property here; for the law which governs personal property is the law of the domicile: See *Whitney v. Dodge*, 105 Cal. 192, 38 Pac. 636, and authorities cited.

In our opinion, the respondent, at the time when the Hawaiian statute took effect, was domiciled in California. This is clearly so, unless we must ignore her actual residence on account of the maxim (or "fiction," as it is sometimes called) that the domicile of the husband is the domicile of the wife. We think that the reason of the rule, and of course the rule itself, ceases when the husband discards his wife by instituting proceedings for the dissolution of the bonds of matrimony. The theoretical unity of husband and wife dissolves in the presence of a legal proceeding, the direct and only purpose of which is to destroy that unity. This is admitted to be so where the wife brings the suit for divorce; but the reason of the rule applies to her, whether she be plaintiff or defendant; her interests and rights as defendant are frequently more serious than any she could have as plaintiff. It is not the law that a husband who is a plaintiff in a divorce suit can—as in <sup>91</sup> the case at bar—actually put his wife out of his home, and at the same time successfully claim that, by operation of law, she is still in it. We think that the correct principle is stated in the decisions hereinafter noticed. In some of them it was held that the divorce itself was invalid outside of the state in which it was granted, because founded upon the theory that the domicile of the husband was the domicile of the wife, contrary to the actual fact; but the principle applies much more strongly to the case at bar, where the question is, not as to the validity of the divorce, but as to the operation of a foreign statute upon her and her personal property at a time when she and the property were in this state.

In *Irby v. Wilson*, 1 Dev. & B. Eq. 568, the parties had married in South Carolina, where they were then domiciled, had afterward removed to and established a residence in Tennessee, and then, after a separation, the wife had gone to North Carolina and permanently resided in the latter state, and afterward the husband had obtained a decree of divorce in Tennessee. The opinion of the court contains interesting discussions of the doctrine of the extraterritorial force of laws and judgments; but the decision turned on the single point that the domicile of the wife at the time of the divorce was in North Carolina, and not in Tennessee, where the domicile of the husband was. The court, among other things, say: "The aphorism that the husband and wife are but one person has been alluded to as founding the argument that his domicile is necessarily hers. . . . But it is a mere fiction, which is never allowed, even in the common law, to obscure, much less defeat, justice. They are two persons to make a marriage contract. They must also, necessarily, be two persons to litigate between themselves upon any subject, and, above all, upon the obligation, continuance, or dissolution of that contract. They are not, therefore, so identified that they cannot have opposing interests; that they cannot have separate existences and separate residences and homes. If the argument of the counsel were well founded, it would prove that the husband might sue his wife for a divorce, enter her appearance, and in her name confess his own allegation." In *Mellen v. Mellen*, 10 Abb. N. C. 329, the court declare the law—we quote for brevity from the syllabus—as follows: "Although, prima facie, the domicile of the wife is the same as that of the husband, the law recognizes an exception to the rule when the husband begins <sup>92</sup> an action to dissolve the marriage contract. In such case, the theoretical identity of person and interest ceases to exist, the legal fiction of one domicile no longer operates, and the jurisdiction of the court to entertain the action depends upon the actual existing facts." In *Colvin v. Reed*, 55 Pa. St. 375, the question involved was that of the domicile of parties to a divorce suit, and the court said: "But the unity of person created by the marriage is a legal fiction, to be followed for all useful and just purposes, and not to be used to destroy the rights of either, contrary to the principles of natural justice, in proceedings which from their nature make them opposite parties. It required their mutual consent to establish the relation from which the unity arises; and the same law of right demands them

to be viewed in their separate natural condition when either proceeds against the other to destroy this relation. It is the necessary effect of their being opposite parties in the same proceedings": See, also, *Derby v. Derby*, 14 Ill. App. 647; *Hewes v. Hewes*, 16 N. Y. Supp. 119 61 Hun, 625.

The principle declared in the above cases is recognized and restated in section 129 of the Civil Code of this state, as follows: "In actions for divorce, the presumption of law that the domicile of the husband is the domicile of the wife does not apply. After separation, each may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions." There is no reason for limiting this broad provision to cases where the wife is plaintiff. In the case of *Wickes' Estate*, 128 Cal. 270, 60 Pac. 867, cited by appellant, there was no question as to the law of domicile as between husband and wife when they are hostile parties to a suit for divorce. There had been no divorce nor action for divorce in that case, and no question touching any phase of the subject of divorce was before the court. There, a married woman had been living, at the time of her death, in a county different from the one in which her husband was living, and in which she formerly lived with him; and it was merely held that under those circumstances the jurisdiction of the administration of her estate was in the county where her husband resided.

Our conclusion is, that at the date of the decree of divorce the respondent was domiciled in California, and had been since she came here in April, 1894; and that therefore the Hawaiian statute under which the forfeiture of her personal property is claimed had no effect upon her or her property in <sup>93</sup> California. It is not necessary, therefore, to consider the point made by respondent, that even if her domicile continued to be that of her husband until the date of the decree, yet upon the entry of the decree her actual residence instantly became her legal residence, and that if the decree, the legal change of residence, and the taking effect of the statute were simultaneous, the court, under the rule that a forfeiture will always be defeated if possible, will give precedence to the change of domicile.

The court did not err in excluding evidence of the fact that appellant had satisfied a judgment recovered against it by the administrator of *Henri G. McGrew* on the policy here sued on, in an action to which the respondent here was not a party. The fact that appellant paid the policy to the wrong party would be no defense to an action brought by the right party.



Under the views which we have taken of the case, the other exceptions argued by appellant are of no importance.

The judgment appealed from is affirmed.

Garoutte, J., Van Dyke, J., and Henshaw, J., concurred.

Rehearing denied.

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**EXCEPTIONS TO RULE THAT THE DOMICILE OF A HUSBAND IS THE DOMICILE OF HIS WIFE.**

- I. After Actual and Apparently Permanent Separation.**
- II. After Agreements for Separation.**
- III. After Husband has Given Cause for Divorce.**
- IV. Forfeiture by Wife of Right to the Benefit of Her Husband's Domicile.**
- V. Cases Denying that Wife can have a Different Domicile.**
- VI. In Proceedings for Divorce.**
- VII. After Divorce a Mensa et Thoro.**
- VIII. General Resume of the Cases Maintaining the Right of a Wife to Establish a Separate Domicile.**

**I. After Actual and Apparently Permanent Separation.**—There are some well-recognized exceptions to the general rule that the domicile of the wife is determined by that of her husband. This rule is founded on a legal fiction, and results from the legal identity of husband and wife, constituting them one person in law, and from her duty to dwell with him. While identity of domicile of husband and wife is always presumed, the presumption may always be rebutted in cases where the duty that they dwell together has ceased to exist. Thus, where there has been a final separation between husband and wife, and they have their actual permanent residence in different states, the domicile of the husband cannot be regarded as fixing that of his wife, in a case where their interests are in conflict, as in actions for divorce: *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335. While, as a general rule, the residence of the wife is fixed by that of her husband, yet it is not true that a wife living separate and apart from her husband cannot establish an independent residence. Thus, where there is a permanent separation between husband and wife, he contending that she deserted him, and she that he declared his purpose not to live with her if she went to a particular place, they at that time living elsewhere, her residence no longer follows his, and she may thereafter acquire a residence in a state other than that of her husband: *Chapman v. Chapman*, 129 Ill. 386, 21 N. E. 806. This same exception to the general rule was applied in a peculiar case in New York where, in an application made to the surrogate of the county of New York by the husband of a decedent to vacate and set aside a decree admitting her will to probate on the ground that she was a resident of Philadelphia



in the state of Pennsylvania, it appeared that although no legal separation had taken place between the decedent and her husband, they had voluntarily lived apart for twelve years, during which time the decedent with her three children had made their home in the city of New York, while her husband remained in Philadelphia, where they had both lived prior to the time of their separation, that during all of that time he had not contributed anything toward the support of his wife and children, although he had never refused to provide a home for them in Philadelphia, and it was held that such deceased wife was a resident of New York for the purpose of the probate of her will, and that the old rule in reference to a married woman's domicile can no longer prevail in view of the rights which have been conferred upon her by statute: *Matter of Florance*, 54 Hun, 328, 7 N. Y. Supp. 578.

**II. After Agreements for Separation.**—"The rule is now well established that a wife may acquire a domicile separate from that of her husband whenever it is necessary for her to do so, and when the husband and wife have separated and agreed to live apart, the wife's domicile cannot be drawn to that of her husband without her consent or without her actual presence at the place of the husband's residence": *Rundle v. Van Innegan*, 9 Civ. Proc. Rep. 330.

**III. After Husband has Given Cause for Divorce.**—If a husband is guilty of such act, or dereliction of duty, in his relation as husband as entitles his wife to have the marital relation partially or totally dissolved, she may establish a separate jurisdictional domicile of her own: *Ditson v. Ditson*, 4 R. I. 87; *Harteau v. Harteau*, 14 Pick. 181, 25 Am. Dec. 372. "Although, as a general rule, the domicile of the husband is, by law, that of the wife, yet, when he commits an offense, or is guilty of such dereliction of duty in the relation as entitles her to have it either partially or totally dissolved, she not only may, but must, to avoid condonation, establish a separate domicile of her own. This she may establish, nay, when deserted or compelled to leave her husband, necessity frequently compels her to establish, in a different judicial or state jurisdiction than that of her husband according to the residence of her family or friends. Under such circumstances she gains and is entitled to gain, for the purposes of jurisdiction, a domicile of her own, and especially if a native of the state to which she flies for refuge, is, upon familiar principles, readily reintegrated in her old domicile": *Ditson v. Ditson*, 4 R. I. 107, 108. Thus, if a husband has forfeited his marital rights by misbehavior, his wife may acquire a separate domicile for all purposes: *Shute v. Sargent*, 67 N. H. 305, 36 Atl. 282. "Doubtless for certain purposes the domicile of the husband is the domicile of the wife. That rule, however, goes upon the unity of husband and wife,

and very generally, if not always, implies continuing, though temporarily interrupted, cohabitation. It excludes, or should exclude, permanent separation. Permanent separation implies separate domiciles of husband and wife. If the rule were to be applied to cases of desertion, it would imply something like an absurdity": *Dutcher v. Dutcher*, 39 Wis. 659. Hence, in cases where the husband has wrongfully deserted and abandoned his wife, she is entitled to establish and acquire a domicile separate from his, either in the same or another state: *Harding v. Alden*, 9 Greenl. 140, 23 Am. Dec. 549; *Masten v. Masten*, 15 N. H. 159; *Hopkins v. Hopkins*, 35 N. H. 474; *Hanberry v. Hanberry*, 29 Ala. 719; *Moffatt v. Moffatt*, 5 Cal. 280; *Payson v. Payson*, 34 N. H. 518; *Turner v. Turner*, 44 Ala. 437. In *Lyon v. Lyon*, 30 Hun, 455, it appeared, in an action brought by a married woman against her husband to recover money had and received, that they, for many years before the commencement of the action, had resided in different counties, in the same state, living apart under an agreement of separation caused by the ill-treatment of the husband, and it was held that an application for change of the place of trial from one of the counties to the other, namely, to that in which the husband had his domicile, was properly denied, as the wife had acquired a separate domicile in the county in which she resided during the separation from her husband.

A wife, if cruelly treated by her husband, so as to endanger her health, or make her life burdensome, may leave his domicile, and acquire one in another state: *Arrington v. Arrington*, 102 N. C. 491, 9 S. E. 200; *Lyon v. Lyon*, 30 Hun, 455. On the other hand, it has been held that the domicile of a husband determines the domicile of his wife, and her removal from the state where her husband is domiciled does not operate to change her domicile, although she is induced to leave him by his cruelty and harsh treatment: *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227.

If a wife is living separate and apart from her husband without sufficient cause, it has been held that his domicile is in law her domicile and she cannot acquire a separate domicile: *Cheely v. Clayton*, 110 U. S. 705, 4 Sup. Ct. Rep. 328; *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. Rep. 449; *Loker v. Gerald*, 157 Mass. 42, 34 Am. St. Rep. 252, 31 N. E. 709.

IV. *Forfeiture by Wife of Right to the Benefit of Her Husband's Domicile.*—An exception to the general rule that the domicile of the husband is that of his wife exists where she voluntarily absents herself, under circumstances amounting to a wrongful abandonment of her husband, and resides permanently in another state: *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 623, 9 S. W. 361. In such case she is precluded after her husband's death from asserting a homestead right in his estate: *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 626, 9 S. W. 361.

**V. Cases Denying that Wife can have a Different Domicile.—**

It has been held in a few cases that a wife cannot, under any circumstances, acquire a domicile by separation from her husband and actual residence elsewhere, that she cannot change her domicile or acquire a separate one without his consent: *Maguire v. Maguire*, 7 Dana, 181; *Johnson v. Johnson*, 12 Bush, 485; *Greene v. Greene*, 11 Pick. 417. This latter case is directly opposed to that of *Harteau v. Harteau*, 14 Pick. 181, 25 Am. Dec. 372.

**VI. In Proceedings for Divorce.—**A well-recognized and generally accepted and applied exception to the general rule that the domicile of the husband is that of the wife, is where one is suing the other for divorce. A wife, after the commission by her husband of an offense or injury which entitles her to a divorce, is under no further obligation to make his residence or domicile hers, but is, for all purposes of seeking redress by divorce, at liberty to acquire or establish for herself a residence or domicile separate from his, and if such residence has the proper elements of permanence, and is acquired in good faith, it is sufficient to authorize a decree of divorce, although the residence and domicile of her husband may be in another and foreign jurisdiction: *Derby v. Derby*, 14 Ill. App. 645; *Harding v. Alden*, 9 Greenl. 140, 23 Am. Dec. 549; *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335; *Dutcher v. Dutcher*, 39 Wis. 659; *Ditson v. Ditson*, 4 R. I. 87; *Barber v. Barber*, 21 How. 582; *Burlen v. Shannon*, 115 Mass. 438. The matrimonial domicile of a wife is usually that of her husband, but if she is justified in leaving him because his conduct has been such as to entitle her to a divorce, and she thereupon does leave him and goes into another state for the purpose of there permanently residing, she acquires a domicile in the latter state: *Atherton v. Atherton*, 155 N. Y. 129, 63 Am. St. Rep. 650, 49 N. E. 933; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129-148; *White v. White*, 18 R. I. 292, 27 Atl. 506; *Smith v. Smith*, 43 La. Ann. 1140, 10 South. 248. A wife's matrimonial domicile does not follow that of her husband, for the purpose of conferring jurisdiction in divorce, where for his alleged infidelity she sues for divorce and thereafter lives apart from him, and where he, in a counter-action for divorce in another state sues her as a nonresident, having removed there for that purpose after the separation: *Gebhard v. Gebhard*, 54 N. Y. Supp. 406.

The theory of the law that husband and wife are one person, and that, wherever the wife may be actually, she is constructively with her husband, is not applicable to a wife who remains where she and her husband last lived together after his desertion, and brings suit against him for divorce founded on his misconduct while they lived together. She may retain her old domicile, acquired while they were actually abiding at the same place, and is not compelled to follow him to a place where she never lived



simply because before she discovered his offense, she intended to go there with him: *Burtis v. Burtis*, 161 Mass. 508, 37 N. E. 740. In speaking of the right of a wife to acquire a separate domicile from that of her husband for the purpose of suing for a divorce, and also of the application of the maxim that the domicile of the husband is that of the wife to such cases, Chief Justice Shaw, in *Harteau v. Harteau*, 14 Pick. 181, 25 Am. Dec. 375, said: "Can this maxim be true in its application to this subject, where the wife claims to act, and by law to a certain extent and in certain cases is allowed to act, adversely to her husband? It would oust the court of its jurisdiction in all cases where the husband should change his domicile to another state before the suit is instituted. It is within the power of a husband to change and fix his domicile at his will. If the maxim could apply, a man might go from this county to Providence, take a house, live in open adultery, abandoning his wife altogether, and yet she could not libel for divorce in this state, where, till such change of domicile, they had always lived. He clearly lives in Rhode Island; her domicile, according to the maxim, follows his; she, therefore, in contemplation of law, is domiciled there too; so that neither of the parties can be said to live in this commonwealth. It is probably a juster view to consider that the maxim is founded upon the theoretic identity of person and of interest between husband and wife, as established by law, and the presumption that, from the nature of that relation, the home of the one is that of the other, and intended to promote, strengthen, and secure their interests in this relation, as it ordinarily exists where union and harmony prevail. But the law will recognize a wife as having a separate existence, and separate interests, and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests and especially a separate domicile and home, bed and board being put, apart for the whole, as expressive of the idea of home. Otherwise, the parties, in this respect, would stand upon very unequal grounds, it being in the power of the husband to change his domicile at will, but not that of the wife. The husband might deprive the wife of the means of enforcing her rights, and, in effect, of the rights themselves, and of the protection of the laws of the commonwealth, at the same time that his own misconduct gives her a right to be rescued from his power on account of his own misconduct toward her." In *Derby v. Derby*, 14 Ill. App. 647, the court said: "Whenever the law permits the wife to bring suit against her husband for divorce, it ceases to regard the theoretic or ideal unity of their persons and interests, but recognizes the wife as having a separate existence and separate interests and rights, and accords to her the remedies appropriate to the situation in



which she is thus placed. As said in *Colvin v. Reed*, 55 Pa. St. 375: 'The unity of persons created by the marriage is a legal fiction, to be followed for all useful purposes, and not to be used to destroy the rights of either, or contrary to the principles of natural justice, in proceedings which, from their nature, make them opposite parties. It required their mutual consent to establish the relation from which that unity arises, and the same law of right demands them to be viewed in their separate natural condition when either proceeds against the other to destroy this relation. It is the necessary effect of their being opposite parties to the same proceeding. Upon the dissolution of the marriage, therefore, each has a right to be heard as a natural person.' The doctrine has been recognized in Wisconsin in a series of decisions that, for the purpose of bringing a suit for divorce, the wife may acquire a residence separate from her husband, and that, from the necessity of the case, this rule is essential to make effectual her right to maintain such an action: *Craven v. Craven*, 27 Wis. 418; *Phillips v. Phillips*, 22 Wis. 256; *Hubbell v. Hubbell*, 3 Wis. 662, 62 Am. Dec. 702; *Manley v. Manley*, 3 Pinn. 390."

Although *prima facie*, the domicile of a wife is that of her husband, the law recognizes an exception to the rule when the husband brings an action to dissolve the marriage contract. In such case, the theoretical identity of person and interest ceases to exist, the legal fiction of one domicile no longer operates, and the jurisdiction of the court to entertain the action depends upon the actual existing facts: *Mellen v. Mellen*, 10 Abb. N. C. 329; *Hewes v. Hewes*, 16 N. Y. Supp. 119, 40 N. Y. St. Rep. 680.

VII. After Divorce a *Mensa et Thoro* a divorced wife is entitled to establish a domicile for herself different from that of her husband, and upon her removal to another place or state, her domicile does not follow his, but remains wherever she chooses to leave or acquire it: *Barber v. Barber*, 21 How. 583; *Bennett v. Bennett*, Deady, 299, Fed. Cas. No. 1318; *Vischer v. Vischer*, 12 Barb. 640; *People v. Dewey*, 50 N. Y. Supp. 1015, 23 Misc. Rep. 267; *Williamsport v. Eldred*, 84 Pa. St. 429; *Hunt v. Hunt*, 72 N. Y. 218, 28 Am. Rep. 129; *O'Dea v. O'Dea*, 101 N. Y. 37, 4 N. E. 110. After divorce, a wife is at liberty to choose her own domicile, and therefore, if parties living in one state are divorced, and the man removes to another state and establishes a domicile there, while the woman remains in the former state, they become citizens of different states, and the latter may maintain an action against the former in the national courts of the state of his domicile on account of such difference of citizenship; *Bennett v. Bennett*, Deady, 299, Fed. Cas. No. 1318. Thus, though the divorce is a *mensa et thoro* only, the divorced wife may sue her divorced husband in the national courts of the state of his new domicile to recover alimony

which he has been decreed to pay as an incident of such divorce: *Barber v. Barber*, 21 How. 582.

**VIII. General Resume of the Cases Maintaining the Right of a Wife to Establish a Separate Domicile.**—The decisions go very far, we think, to show that the common-law unity of husband and wife no longer exists, and that while his residence is presumed to be, and ordinarily is, hers also, yet, as each has a separate existence in law, as well as in fact, each may have a separate home, domicile, or residence, especially when they have interests adverse to each other. Expressions in many decided cases must necessarily lead to this conclusion. Thus, in *Howland v. Granger*, 22 R. I. 1, 45 Atl. 740, it was contended that a married woman, while the unity of the marriage relation existed, undisturbed, might acquire a domicile other than that of her husband, and the court said: "The contention rests on the argument that the common-law status of a married woman, by which her legal existence is suspended during the marriage, or merged in that of her husband, has largely ceased to maintain in modern times, and especially in this state, where the law recognizes her as having a separate existence and separate rights as to her property, and consequently separate interests. After a careful examination of the authorities, however, we have come to the conclusion that, though a wife may acquire a domicile distinct from that of her husband whenever it is necessary or proper for her to do so—as, for instance, where the husband and wife are living apart by mutual consent: *In re Florance*, 54 Hun. 328, 7 N. Y. Supp. 578; or where the wife has been abandoned by the husband: *Shute v. Sargent*, 67 N. H. 305, 36 Atl. 282; or for purposes of divorce: *Ditson v. Ditson*, 4 R. I. 87; or, in short, whenever the wife has adversary interests to those of her husband, she cannot acquire such a domicile, so long as the unity of the marriage relation continues undisturbed, notwithstanding that from considerations of health, as in the present case, or of expediency, one of the parties, with the consent of the other, is actually living in a different place or country." In *Burlington v. Swanville*, 64 Me. 78, it was held that, though a wife cannot have a pauper settlement different from that of her husband, she can so establish her residence in a town other than that in which he resides so as to have her home separate from his, so that in law, as well as in fact, her home will not be his home. In *Smith v. Smith*, 43 La. Ann. 1146, 10 South. 248, the court said that: "Although the law fixes the domicile of the wife as being that of her husband, universal jurisprudence recognizes an exception to the rule where the husband's conduct has been such as to furnish lawful ground for divorce, which justifies her in leaving him, and, therefore, necessarily authorizes her to live elsewhere, and to ac-

quire a separate domicile." To the same effect: *In re Colebrook*, 55 N. Y. Supp. 861, 26 Misc. Rep. 139; *Hunt v. Hunt*, 72 N. Y. 218, 28 Am. Rep. 129; *O'Dea v. O'Dea*, 101 N. Y. 37, 4 N. E. 110; *Atherton v. Atherton*, 155 N. Y. 129-134, 63 Am. St. Rep. 650, 49 N. E. 933. In *Irby v. Wilson*, 1 Dev. & B. Eq. 568-582, it was held that the fiction that the domicile of a husband is that of the wife is never allowed, even in the common law, to obscure, much less defeat, justice, and where the husband and wife have adversary interests, in a suit between them, her domicile is where she actually resides. "Doubtless, for certain purposes, the domicile of the husband is the domicile of the wife. That rule, however, goes upon the unity of husband and wife, and very generally, if not always, implies continuing, though temporarily interrupted, cohabitation. It excludes, or should exclude, permanent separation. Permanent separation implies separate domiciles of husband and wife": *Dutcher v. Dutcher*, 39 Wis. 659. "The unity of person created by the marriage is a legal fiction, to be followed for all useful and just purposes, and not to be used to destroy the rights of either, contrary to the principles of natural justice, in proceedings which, from their nature, make them opposite parties. It required their mutual consent to establish the relation from which the unity arises, and the same law of right demands them to be viewed in their separate natural condition when either proceeds against the other. It is the necessary effect of their being opposite parties in the same proceeding": *Colvin v. Reed*, 55 Pa. St. 379.

In New York, it has been said: "The rule is now well established that a wife may acquire a domicile separate from that of her husband whenever it is necessary for her to do so, and when husband and wife have separated and agreed to live apart, the wife's domicile cannot be drawn to that of her husband without her consent or without her actual presence at the place of the husband's residence": *Rundle v. Van Innegan*, 9 Civ. Proc. Rep. 330. And that "the domicile of the husband is *prima facie* the domicile of the wife. There are, however, exceptions to the rule, one of which is invoked by the plaintiff in this suit, so that in certain cases a married woman may have a domicile in another jurisdiction from that of her husband. This is so when they are living apart, under a judicial decree of separation, or when the conduct of the husband has been such as to entitle the wife to an absolute or a limited divorce, she may acquire a separate domicile whenever it is necessary for her to do so. But the right to do so springs from the necessity for its exercise": *Hunt v. Hunt*, 72 N. Y. 242, 28 Am. Rep. 129. This language has been quoted with approval in the subsequent cases of *O'Dea v. O'Dea*, 101 N. Y. 37, 4 N. E. 110, and *Atherton v. Atherton*, 155 N. Y. 129, 63 Am. St. Rep. 650, 49 N. E. 933.



In New York, the question arose what was the domicile of the wife with respect to the place or county wherein an action could be tried. It was not a suit for divorce, but was by a wife to recover her interest in her father's estate, which she claimed to have intrusted to her husband for safekeeping. The suit was brought in Orange county, wherein she lived, and he claimed the right to transfer it to Kings county, on the ground that that was the county of his residence, and, in contemplation of law, hers. The court said that there was a distinction between residence and domicile; the domicile of a person might be in one place, and his residence in another; that, as the wife, at the commencement of the action, was living in Orange county apart from her husband under an agreement of separation, she had the right to commence her action in that county: *Lyon v. Lyon*, 30 Hun, 455. In another case in New York, the question was presented respecting the probate of a will in that state executed by a married woman who had died therein. She had, however, during a portion of her married life, lived with her children in Philadelphia, wherein his residence was and ever after remained. They separated from each other, he remaining in Philadelphia, and she going to reside with her three children in New York, where she afterward cared for and maintained them, and accumulated a large amount of property. The husband claimed that, as no legal separation had taken place between them, although they had lived apart for many years, her residence was the same as his, in Pennsylvania, and that the estate was to be distributed by the laws of that state. The court, however, held that her residence was in New York: *Matter of Florance*, 54 Hun, 328, 7 N. Y. Supp. 578.

In New York, in proceedings in habeas corpus, the court again held that the domicile of the wife might be different from that of her husband, and was so where she went to another state with intent to there permanently reside: *In re Colbrook*, 55 N. Y. Supp. 861, 26 Misc. Rep. 139.

There is no doubt that husband and wife may have a separate domicile for the purpose of maintaining actions of divorce, and this was placed upon the broad ground that "the rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues": *Cheever v. Wilson*, 9 Wall. 123.

So, where it is proper for a wife to maintain a civil action against her husband, and they reside in different states, she may sue him in the state of his residence in the national courts therein, though she is not entitled to do so if they can be regarded as residents of the same state. In this case, however, there was a decree of



divorce *a mensa et thoro*, and the husband had probably gone into another state to prevent the wife from collecting alimony from him: *Barber v. Barber*, 21 How. 593; *Bennett v. Bennett*, Deady, 299, Fed. Cas. No. 1318.

In Illinois, where it was claimed by a married woman that she was not a resident of that state at the time of the commission of an offense, but was necessarily a resident of New York, because that was the residence of her husband, it being admitted that they lived separate and apart, he having declared his purpose of not living with her if she went to Illinois, the court said: "Under these facts, her residence was no longer the same as his, and she might thereafter lawfully acquire a residence in a state different from that in which he resided within the meaning of our divorce statute, provided, of course, the change was made in good faith, and not merely for the purpose of instituting divorce proceedings": *Chapman v. Chapman*, 129 Ill. 386, 21 N. E. 806.

In *Shute v. Sargent*, 67 N. H. 305, 36 Atl. 282, it appeared that a husband and wife were residing together in Massachusetts, where he abandoned her, and subsequently procured her ejectment by legal process from the house in which they had been living. Subsequently she removed to New Hampshire, where she remained until her death, the husband retaining a domicile in Massachusetts. In proceedings respecting the probate of her will, the question arose as to whether for that purpose her domicile was in New Hampshire, whither she had gone, or in Massachusetts, where her husband remained. The court held that by the laws prevailing in New Hampshire the ancient unity of husband and wife had become dissevered, and the theory of her servitude superseded by the theory of equality, and that since the law put her upon equality, so that he had no more power or authority over her than she over him, no reason remained why she might not acquire a separate domicile for every purpose known to the law, and that "when-ever it is necessary" or proper for her to acquire a separate domicile, she may do "so"; and further, that she must be regarded as domiciled in New Hampshire at the time of her decease, so as to justify the distribution of her estate therein according to its laws.

In this case, the court said: "But the common-law theory of marriage has largely ceased to obtain everywhere, and especially in this state, where the law has long recognized the wife as having a separate existence, separate rights, and separate interests. In respect to the duties and obligations which arise from the contract of marriage and constitute its object, husband and wife are still, and must continue to be, a legal unit, but so completely has the ancient unity become dissevered and the theory of the wife's servitude superseded by the theory of equality which has been estab-

lished by the legislature and adjudications of the last half century that she now stands, almost without exception, upon an equality with the husband, as to property, torts, contracts, and civil rights. And since the law puts her upon an equality, so that he now has no more power and authority over her than she has over him, no reason would seem to remain why she may not acquire a separate domicile for every purpose known to the law. If, however, there are exceptional cases, when, for certain purposes, it might be held otherwise, there can be in this jurisdiction no reason for holding that when the husband has forfeited his marital rights by his misbehavior, the wife may not acquire a separate domicile, and exercise the appertaining rights and duties of citizenship with which married women have become invested. . . . The good sense of the thing is, that the wife cannot be divested of the right of suffrage, or be deprived of any civil or legal right, by the act of her husband, and so we take the law to be. Whenever it is necessary or proper for her to acquire a separate domicile, she may do so. This is the rule for the purposes of divorce, and it is the true rule for all purposes": *Shute v. Sargent*, 67 N. H. 306, 36 Atl. 282.

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## ESTATE OF LIVERMORE.

[132 Cal. 99, 64 Pac. 113.]

**GUARDIAN AND WARD—DEATH OF WARD TERMINATES JURISDICTION.**—The superior court is without jurisdiction after the death of a ward to order a sale of his real estate, though to pay an indebtedness due from him to his guardian, upon the settlement of the latter's accounts.

**GUARDIAN AND WARD—DEATH OF WARD—EXECUTION OF DEED AFTER.**—A guardian can execute a deed only in the name of a living ward. After the ward's death, this power is gone.

**GUARDIAN AND WARD—DEATH OF WARD—REMEDY OF GUARDIAN FOR DEBT DUE.**—The remedy of a guardian to enforce an indebtedness due from his deceased ward is to administer upon his estate.

Metcalf & Metcalf and Johnson & Shaw, for the appellant.

W. R. Davis and G. W. Langan, for the respondent.

<sup>100</sup> **GAROUTTE, J.** This appeal is taken from an order allowing a guardian to sell real estate which formerly belonged to the ward. Prior to the application for the order the ward had died, being at the time over the age of majority. After

her death the guardian filed her accounts, and upon the settlement thereof it was found and decreed by the court that the estate of the ward was indebted to her in a considerable sum of money. Thereupon this application for a sale of the real estate of the late ward was made by the guardian, and ordered granted by the court.

The foregoing proceeding is unique in this state, and the order made by the trial court cannot find support in the law. The title furnished to a purchaser at the sale by the deed of the guardian would not be worth a dollar. The proceedings here taken for the sale were had under the code provisions <sup>101</sup> pertaining to guardianship matters, and as to a sale of real estate, those proceedings only contemplate a case where there is a living ward—a living ward not only when the proceedings are inaugurated, but up to and including the moment the deed is made. When the guardian executes the deed, he executes it for and in the place and stead of his ward, and the moment that ward is dead, his power to execute the deed is gone. He has no more power to execute a deed under these circumstances than would an attorney in fact after the death of his principal.

It is unnecessary to consider here what a court of equity might do under the circumstances presented by the facts of this case, in aid of the probate jurisdiction of the superior court. For here the statutory procedure laid down in the code in guardianship proceedings alone has been followed, and the sale is asked under that procedure. The guardian, as such, is attempting to make the sale, and the court is well assured it cannot be done. In *Alford v. Halbert*, 74 Tex. 354, 12 S. W. 76, a case similar in principle to the one at bar, the court said, in speaking of the efforts of a guardian to recover from the ward's estate the amount found due him by the probate court: "We think the only course left her was to administer in the proper court upon the estate of the deceased ward."

For the foregoing reasons the order is reversed and the cause remanded.

Van Dyke, J., and Harrison, J., concurred.

Hearing in bank denied.

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**A Guardian's Powers and Duties Cease when his ward attains the age of majority:** *Overton v. Beavers*, 19 Ark. 623, 70 Am. Dec. 610.



## PEOPLE v. BOTKIN.

[132 Cal. 231, 64 Pac. 286.]

**CRIMINAL LAW—INSTRUCTIONS.**—A charge given by the court containing declarations which have been held unsound by the supreme court in another case is ground for the reversal of a judgment of conviction.

**CRIMINAL LAW—SENDING POISON BY MAIL—DEATH IN ANOTHER STATE—VENUE OF CRIME.**—Under a statute providing that all persons who commit, in whole or in part, any crime within the state are liable to punishment under the laws thereof, one who, within the state, mails poison with intent to take the life of a person in another state, is, if such person received and took such poison and died therefrom, guilty of murder committed, in part, in the state from which the poison was sent, and is punishable under the law of that state, as if the crime were committed entirely therein.

G. A. Knight, Knight & Heggerty, F. McGowan, and C. M. Wheeler, for the appellant.

T. L. Ford, attorney general, and H. A. Melvin, for the respondent.

<sup>232</sup> GAROUTTE, J. Defendant has been convicted of the crime of murder, and prosecutes this appeal. The charge of the court given to the jury upon the law contained declarations which were held to be unsound in *People v. Vereneseneckockockhoff*, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111. In view of the decision in that case, the attorney general concedes that the judgment should be reversed and the cause remanded to the trial court for further proceedings. But defendant claims that she is not triable at all by the courts of this state, and this contention should now be passed upon. For, if maintainable, a second trial becomes a useless expenditure of money, time, and labor, and necessarily should not be had.

For the purposes of testing the claim of lack of jurisdiction in the courts of California to try defendant, the facts of this case may be deemed as follows: Defendant, in the city and county of San Francisco, state of California, sent by the United States mail to Elizabeth Dunning, of Dover, Delaware, a box of poisoned candy, with intent that said Elizabeth Dunning should eat of the candy and her death be caused thereby. The candy was received by the party to whom addressed, she partook thereof, and her death was the result. Upon these facts may the defendant be charged and tried for the crime of mur-



der in the courts of the state of California? We do not find it necessary to declare what the true rule may be at common law upon this state of facts, for, in our opinion, the statute of this state is broad enough to cover a case of the kind here disclosed. There can be no question but that the legislature of this state had the power to declare that the acts here pictured constitute the crime of murder in this state, and we now hold that the legislative body has made that declaration.

Section 27 of the Penal Code reads as follows:

"The following persons are liable to punishment under the laws of this state: 1. All persons who commit, in whole or in part, any crime within this state; 2. All who commit larceny or robbery out of this state, and bring to, or are found with the property stolen, in this state; 3. All who, being out of this state, cause or aid, advise, or encourage, another person to commit a crime within this state, and are afterward found therein."

**233** Subdivision 1 covers the facts of this case. The acts of defendant constituted murder, and a part of those acts were done by her in this state. Preparing and sending the poisoned candy to Elizabeth Dunning, coupled with a murderous intent, constituted an attempt to commit murder, and defendant could have been prosecuted in this state for that crime, if, for any reason, the candy had failed to fulfill its deadly mission. That being so—those acts being sufficient, standing alone, to constitute a crime, and those acts resulting in the death of the person sought to be killed—nothing is plainer than that the crime of murder was in part committed within this state. The murder being committed in part in this state, the section of the law quoted declares that persons committing murder under those circumstances "are liable to punishment under the laws of this state." The language quoted can have but one meaning, and that is: A person committing a murder in part in this state is punishable under the laws of this state, the same as though the murder was wholly committed in this state.

Counsel for defendant insist that this section contemplates only offenses committed by persons who, at the time, are without the state. This construction is not sound. For as to subdivision 1, it is not at all plain that a person without the state could commit, in whole, a crime within the state. Again, if the crime in whole is committed within the state by a person without the state, such a person could not be punished under the laws of this state, for the state has not possession of his body, and there appears to be no law by which it may secure that

possession. Indeed, all of the subdivisions of the section necessarily contemplate a case where the person is, or comes, within the state. If the framers of the section had intended by subdivision 1 to cover the case of persons only who were without the state when the acts were committed which constitute the crime, they would have inserted in the section the contingency found in the remaining subdivisions, which subdivisions contemplate a return to the state of the person committing the crime. It is plain that the section, by its various provisions, was intended to embrace all persons punishable under the laws of the state of California. The defendant, having committed a murder in part in the state of California, is punishable under the laws of the state, exactly in the same way, in the same courts, and under the same procedure, as if the crime was committed entirely within the state.

<sup>234</sup> For the foregoing reasons the judgment and orders are reversed and the cause remanded.

McFarland, J., Van Dyke, J., Henshaw, J., Beatty, C. J., and Temple, J., concurred.

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**Homicide—Place Where Committed.**—It has been held that if a shot is fired in one state at a person in another, resulting in his death, the crime is deemed to be committed in the state where the shot takes effect, and not where it is fired. Therefore, the courts of the latter state have no jurisdiction to try and punish the party: See the monographic note to *Simpson v. State*, 44 Am. St. Rep. 80, 81.

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## COUNTY OF YOLO v. COGLAN.

[132 Cal. 265, 64 Pac. 403.]

**STATUTES—CONCLUSIVE EVIDENCE OF PASSAGE—COLLATERAL IMPEACHMENT—RESORT TO JOURNALS.** The validity of a statute, duly certified, approved, enrolled, and deposited in the office of the secretary of state, is conclusively presumed to have been properly passed, and cannot be impeached by a resort to the journals of the legislature to show that it did not receive the concurrence of a majority of the members thereof as required by the constitution.

**STATUTES—PASSAGE OF—FUNCTION OF LEGISLATURE.**—A constitutional mandate that the yeas and nays, upon the passage of a bill, shall be entered upon the journals of the legislature, does not change the rule that it is the exclusive function of the legislature to determine by proper authentication that the bill has been properly passed. The power to determine whether these formalities have been complied with is necessarily vested

in the legislature alone, since, otherwise, it would be powerless to enact a statute.

**STATUTES—REPEAL.**—Statutes authorizing county officers to collect and withhold from the state commissions for the collection of the revenue of the state, and providing that all fees or commissions allowed to, or received by, county officers for such services shall be paid into the county treasury and apportioned to the salary fund, are repealed by a later statute abolishing all commissions or fees paid by the state to the officers of any county for services in the collection of taxes.

**STATUTES.—REPEAL** of an "abolishing" statute does not revive the statutes abolished by its passage.

E. R. Bush, district attorney, and Devlin & Devlin, for the appellant.

T. L. Ford, attorney general, and G. A. Sturtevant, deputy attorney general, for the respondent.

**266 THE COURT.** When this case was in department an opinion was prepared and submitted by the commissioners, and after oral argument in bank, and full consideration of the case, we are satisfied with that opinion and the conclusion therein reached. The opinion is as follows:

**HAYNES, C.** The county of Yolo petitioned the superior court for a writ of mandate to compel the respondent to allow the petitioner to retain out of any moneys belonging to the state of California which might be in the hands of the treasurer of said county at its settlement with the respondent in December, 1899, the sum of twenty-six thousand seven hundred and seventy-one dollars and twenty cents, and such other sum as may have accrued to the county upon said December settlement, "for commissions, charges, and fees directed and fixed by law to be allowed to it for services of its auditor and assessor in connection with the state taxes" for the fiscal year 1893-94, and for each successive fiscal year since that date.

An alternative writ was granted, the respondent answered, and upon the hearing the writ was denied and the petition dismissed, and from the judgment of dismissal the petitioner appeals upon the judgment-roll.

Said fees and commissions are claimed by the petitioner to have accrued to it under section 107 of the general revenue act of 1861 (Stats. 1861, p. 453), and under sections 13 and 15 of the act of March 5, 1870: Stats. 1869-70, p. 148.

**267** The respondent contends that said statutes were superseded and rendered inoperative by the county government act of 1883; or if not, that they were directly repealed, so far as said



fees and commissions are concerned, by an act approved February 23, 1893 (Stats. 1893, p. 5), except as to commissions paid to the assessors of the several counties for services in the collection of personal property taxes, as provided by chapter 8 of the Political Code, and except, also, as to the mileage allowed the county treasurer in making settlements with the state, under section 3876 of the same code, and as to which there is no controversy.

The petitioner—appellant here—contends that said repealing act never became a law, because it did not receive, in the senate, the number of votes required by the constitutional provision that “no bill shall become a law without the concurrence of a majority of the members elected to each house.”

The court found that the journal of the senate showed that the vote on said bill was, ayes, twenty, noes, three, twenty-one being a majority of the senators elected.

The question whether the validity of a statute duly certified, approved, enrolled, and deposited in the office of the secretary of state can be impeached by a resort to the journals of the legislature has been long controverted, and the conclusions reached in the courts of last resort of the different states are inharmonious and conflicting, and this want of harmony is frequently found in the different decisions in the same state, and this remark is not entirely inapplicable to the state of California.

In *Fowler v. Pierce*, 2 Cal. 165, it was held that the court may go behind the record evidence of a statute, and inquire whether it was passed or approved in accordance with the constitution.

The case of *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93, decided in 1866, overruled *Fowler v. Pierce*, 2 Cal. 165, and it was held that “neither the journals of the legislature, nor the bill as originally introduced, nor the amendments attached to it, nor parol evidence, can be received in order to show that an act of the legislature properly enrolled, authenticated, and deposited with the secretary of state either did not become a law in accordance with the prescribed forms, or did not become a law as enrolled.”

<sup>208</sup> The opinion of the court in that case was delivered by Mr. Justice Sawyer. It is too long to be quoted here, and any attempt at condensation would weaken its force. In it will be found not only cogent arguments in support of the conclusions

reached, but many authorities entitled to the highest consideration.

In *Oroville etc. R. R. Co. v. Plumas County*, 37 Cal. 355, the invalidity of an act of the legislature was alleged, upon the ground that its passage was procured by fraud. The court, by Rhodes, J., said: "An act of the legislature is not subject to attack on that ground; and it is sufficient on this point to refer to *Sherman v. Story*, 30 Cal. 266, 89 Am. Dec. 93."

In *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432, the question was presented, whether the motive of the mover of a resolution to adjourn the senate was to prevent thereby the executive from returning the bill with his vote. Wallace, J., held the evidence incompetent: Citing *Sherman v. Story*, 30 Cal. 266, 89 Am. Dec. 93.

In *People v. Burt*, 43 Cal. 560, the court, by Belcher, J., said: "If an act is properly enrolled, authenticated, and deposited with the secretary of state, it is conclusive evidence of the will of the legislature at the time of its passage": Citing *Sherman v. Story*, 30 Cal. 266, 89 Am. Dec. 93.

In *Oakland Paving Co. v. Hilton*, 69 Cal. 480, 11 Pac. 3, a proposed amendment of the constitution was referred to in the journal of the senate and assembly as Senate Bill No. 10, but was not copied at large in the respective journals. It was held by Thornton, J., and McKee, J., that the failure to enter the proposed amendment at large in the journals was in violation of section 1 of article 18 of the constitution, and that the amendment never took effect. The opinion was written by Thornton, J., who said: "There is nothing here in conflict with what is said in *Sherman v. Story*, 30 Cal. 266, 89 Am. Dec. 93."

In *People v. Dunn*, 80 Cal. 211, 13 Am. St. Rep. 118, 22 Pac. 140, it was contended by the respondent that "every act not shown in the journals to have taken place must be presumed not to have been done." The court said that this contention cannot be upheld by reason or authority, and that the question as to the power of the court to go behind the enrolled bill in order to determine from the journals whether the bill was properly passed was not presented.

<sup>269</sup> *Hale v. McGettigan*, 114 Cal. 112, 45 Pac. 1049, was similarly disposed of. It was said (114 Cal. 114, 115, 54 Pac. 1049): "It is, however, unnecessary for us to determine in the present case whether the journals of either branch of the legislature may, under any circumstances, be examined for the purpose of impeaching the validity of an act that has been duly enrolled and

deposited with the secretary of state, since we are of the opinion that it does not appear from those journals that the act in question was not constitutionally passed."

It is clear, even upon the authority of those cases which hold that the journals may be looked into to determine whether a bill has been passed in conformity to the requirements of the constitution, that the validity of the statute does not depend upon the failure or omission of the journals to show affirmatively that such requirements were in fact complied with, and hence the correctness of the decisions in *People v. Dunn*, 80 Cal. 211, 13 Am. St. Rep. 118, 22 Pac. 140, and *Hale v. McGettigan*, 114 Cal. 112, 45 Pac. 1049, cannot be questioned; yet it is equally clear that if the enrolled statute in the office of the secretary of state is conclusive, and unimpeachable by the legislative journals, each of those cases could have been decided with equal propriety upon that ground. These cases have, therefore, been regarded as somewhat weakening the force of *Sherman v. Story*, 30 Cal. 266, 89 Am. Dec. 93, and *People v. Burt*, 43 Cal. 560.

*Weill v. Kenfield*, 54 Cal. 111, is cited with much confidence by appellant. The report of that case contains no statement of the points or authorities of counsel, nor is any decision of this court, or any other, cited in the opinion. The question we are now considering is not even suggested in it. There was no controversy in that case as to what transpired in the assembly in relation to the passage of the act, it being conceded that only the title and the first few words of the bill were read, the question considered being whether such reading fulfilled the requirement of the constitution in that regard. Here, what transpired in the senate is the very point in controversy—appellant contending that the journal contains the only competent evidence, while respondent insists that the enrolled act, duly signed, approved, and filed with the secretary of state, is the conclusive evidence that the bill did receive the vote of a majority of the members elected to each house. If it were here conceded that the bill in question received but twenty votes in the senate, *Weill v. Kenfield*, 54 Cal. 111, would be in point. Indeed, in such case there could be no controversy.

<sup>270</sup> The learned justice (McKinstry) who wrote the opinion in *Weill v. Kenfield*, 54 Cal. 111, in a later case (*People v. Thompson*, 67 Cal. 628), though placing the decision upon a different ground, made some remarks tending strongly to sustain the proposition that the enrolled statute should be held con-



clusive. That was a petition for a writ of mandate directing the secretary of state to certify that the petitioners had been duly elected as members of Congress in congressional districts created by the act of 1872, claiming that the act of 1883, under which the election was proclaimed by the governor, was invalid because of noncompliance by the legislature with certain formalities required by the constitution, the petitioners having received a few votes each in the old districts, while the great mass of the people observed the new law and voted in the new districts. The decision was based upon the ground that the proclamation giving notice of the election according to the law must control, whether it was valid or not. It was there said: "Courts of justice in this state take judicial notice, perhaps, of the contents of the journals of the two houses of the legislature; the citizens at large are not required to take legal notice of the entries of the journals. The people had not been actually notified of such entries when the election was held. They had before them (let us assume) the statute of 1883, approved by the governor, and published as statutes are required to be published, and the governor's proclamation. We are asked to decide that all the voters should have inquired whether the statute was invalid by reason of matters of which they had not been notified; that the duty was imposed upon them to make investigation into the history in the legislature of the bill for the act of 1883, and to consider questions as to the validity of the law arising out of the proceedings in the legislature which preceded its final passage."

Here is an actual case practically illustrating the confusion and uncertainty which must inevitably result from the doctrine contended for by appellant.

Appellant also cites *Stevenson v. Colgan*, 91 Cal. 649, 25 Am. St. Rep. 230, 27 Pac. 1089, and *Popper v. Broderick*, 123 Cal. 456, 56 Pac. 53. The first of these cases is distinguished by the court from those cases where it has been held that the court may look into the journals of the legislature for the purpose of determining whether a statute was in fact passed by the requisite vote required by the constitution; <sup>271</sup> but the court said: "While the courts have undoubted power to declare a statute invalid when it appears to them, in the course of judicial action, to be in conflict with the constitution, yet they can only do so when the question arises as a pure question of law, unmixed with matters of fact, the existence of which must be determined upon a trial, and as the result of, it may be, conflicting evidence." This

proposition utterly destroys appellant's contention, since whether a bill was passed by a majority vote is a question of fact which could only be established by evidence of what took place in the legislature. In the case of *Popper v. Broderick*, 123 Cal. 456, 56 Pac. 53, no question here involved was presented or discussed.

From this review of the cases in this court it appears that the case of *Sherman v. Story*, 30 Cal. 266, 89 Am. Dec. 93, has not been followed in some cases where it might have been, the decision being reached upon other grounds; that it has been quoted and followed in two cases, distinguished in another, and that in the only case directly conflicting with it, the opposite doctrine was assumed without discussion, upon conceded facts, and without reference to that case or any other.

We are referred by appellant to *County of San Mateo v. Southern Pacific Co.*, 8 Saw. 238, 294, 13 Fed. 722, 767, where the same learned justice who wrote the opinion in *Sherman v. Story*, 30 Cal. 266, 89 Am. Dec. 93, afterward, as United States circuit judge, said: "While we think the case of *Sherman v. Story* correctly decided under the constitution as it then was, we are of the opinion that the change in the constitution requires a change in the rule, and such seems to be the view of the supreme court of California in *Weill v. Kenfield*, 54 Cal. 111"; and cites *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571, and note, and *Prescott v. Board of Trustees*, 19 Ill. 326, saying that California adopted the said provision in its present constitution substantially as found in the constitution of Illinois. But this change in the constitution does not affect the rule that the record consisting of the enrolled statute in the office of the secretary of state cannot be impeached by evidence of any fact outside of such record, as was clearly shown in the opinion of the same justice in *Sherman v. Story*, 30 Cal. 266, 89 Am. Dec. 93. If it could be, then, before it can be determined what the law is in any given case, resort must be had to the journals of the legislature, which are often imperfect and erroneous, and different courts might readily differ in their conclusions as to <sup>272</sup> whether the evidence obtained from the journals did or did not show that the requirements of the constitution had been complied with. We are not bound, however, by this decision of a federal court, not only because our conclusion upon the question cannot be reviewed by that court, but because the supreme court of the United States has reached a different conclusion.

In *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. Rep. 495, it was said (143 U. S. 668, 12 Sup. Ct. Rep. 496): "The contention of the appellants is, that this enrolled act in the custody of the secretary of state, and appearing, upon its face, to have become a law in the mode prescribed by the constitution, is to be deemed an absolute nullity in all its parts because—such is the allegation—it is shown by the congressional record of proceedings, reports of committees of each house, reports of committees of conference, and other papers printed by authority of Congress, and having reference to House Bill 9416, that a section of the bill as it finally passed was not in the bill authenticated by the signatures of the presiding officers of the respective houses of Congress, and approved by the President." After quoting the alleged omitted section, the opinion proceeds: "The argument in behalf of appellants is, that a bill signed by the speaker of the house of representatives and by the president of the senate, presented to and approved by the President of the United States, and delivered by the latter to the secretary of state as an act passed by Congress, does not become a law of the United States, if it had not in fact been passed by Congress. In view of the express requirements of the constitution, the correctness of this general principle cannot be doubted. There is no authority in the presiding officers of the house of representatives and the senate to attest by their signatures, nor in the President to approve, nor in the secretary of state to receive and cause to be published, as a legislative act, any bill not passed by Congress. But this concession of the correctness of the general principle for which the appellants contend does not determine the precise question before the court; for it remains to inquire as to the nature of the evidence upon which a court may act when the issue is made as to whether a bill, originating in the house of representatives or the senate, and asserted to have become a law, was or was not passed by Congress. It has received, as its importance required that it should receive, the most deliberate consideration. We recognize, on the one hand, the duty of this court, from the performance of <sup>273</sup> which it may not shrink, to give full effect to the provisions of the constitution relating to the enactment of laws that are to operate wherever the authority and jurisdiction of the United States extend. On the other hand, we cannot be unmindful of the consequences that must result if this court should feel obliged, in fidelity to the constitution, to declare that an enrolled bill, on which depend public and private interests of vast magnitude, and which has



been authenticated by the signatures of the presiding officers of the two houses of Congress, and by the approval of the President, and been deposited in the public archives as an act of Congress, was not in fact passed by the house of representatives and the senate, and therefore did not become a law." After quoting from article 1, section 5, of the constitution, the court proceeded: "It was assumed in argument that the object of this clause was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was in fact passed by the two houses of Congress. But the words used do not require such interpretation. On the contrary, as Mr. Justice Story has well said, 'the object of the whole clause is to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents. And it is founded in sound policy and deep political foresight. Intrigue and cabal are thus deprived of some of their main resources, by plotting and devising measures in secrecy. The public mind is enlightened by an attentive examination of the public measures; patriotism, and integrity, and wisdom obtain their due reward, and votes are ascertained, not by vague conjecture, but by positive facts.' . . . The signing, by the speaker of the house of representatives, and by the president of the senate in open session, of an enrolled bill is an official attestation, by the two houses, of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President that a bill, thus attested, has received in due form the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill thus attested receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the <sup>274</sup> President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the secretary of state carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to the coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated, leaving the courts to determine,

when the question properly arises, whether the act so authenticated is in conformity with the constitution."

The court in that case cited *Sherman v. Story*, 30 Cal. 266, 89 Am. Dec. 93, and quoted extensively from it, and also cited and approved *Pangborn v. Young*, 32 N. J. L. 29, and *State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721. The opinion in the latter case was delivered by Mr. Justice Beatty (now chief justice of this court). In it the question here under consideration was very fully discussed and numerous authorities cited and reviewed.

It is true, the supreme court of the United States, in the case above cited, referred to the case in 8 Sawyer, supra, quoting the remark of Judge Sawyer, that the constitution had been changed since *Sherman v. Story*, 30 Cal. 266, 89 Am. Dec. 93, was decided; but that court did not specify or comment upon change. It is also true that the court said: "In regard to certain matters, the constitution expressly requires that they shall be entered on the journal. To what extent the validity of legislative action is affected by the failure to have those matters entered on the journal, we need not inquire." The reasoning of the court, however, in *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. Rep. 495, is equally as conclusive in the case at bar as under the facts there stated. The mandate of our constitution, that the yeas and nays shall be entered on the journal, in the absence of a further provision making the journal higher evidence of the due passage of a bill than the approved and enrolled statute, does not affect the question. Such provision would, in effect, empower the courts to correct the journals of the legislature, and declare that a bill, certified by it to have been passed, was not passed—a power that is nowhere in the constitution either expressly or impliedly given to the judicial department.

The law-making power of the state is vested, by the constitution, <sup>275</sup> in the legislature; and while the constitution has prescribed the formalities to be observed in the passage of bills and the creation of statutes, the power to determine whether these formalities have been complied with is necessarily vested in the legislature itself, since, if it were not, it would be powerless to enact a statute. The constitution has not provided that this essential power thus vested in the legislature shall be subject to review by the courts, while it has expressly provided that no person charged with the exercise of powers properly belonging to one of the three departments—the legislative, executive, and judicial—into which the powers of the government are divided, shall exercise any functions appertaining to either of the others.

In *Pangborn v. Young*, 32 N. J. L. 29, the constitution provided, as to the form of enacting bills, "that the yeas and nays of the members voting on such final passage shall be entered on the journal," and is therefore directly in point here. For a citation of numerous authorities for and against the rule laid down in *Sherman v. Story*, 30 Cal. 266, 89 Am. Dec. 93, see 2 Notes on California Reports, 573.

It is further contended by appellant that said act of 1893 "does not purport to abolish the fees and percentages allowed to the county by section 15 of the act of March 5, 1870 (Stats. 1869-70, p. 164), or the commissions allowed to the treasurer for the disbursement of public money by section 107 of the act of 1861: Stats. 1861, p. 453."

Under the acts of March 5, 1870, and March 1, 1874, the county officers were authorized to collect and hold from the state the commissions for the collection of the revenue; but a later act (Stats. 1873-74, p. 420) provided that all fees or commissions allowed to or received by these county officers for these services in collecting the revenues of the state should be paid into the county treasury and apportioned to the salary fund; so that while the counties, and not the officers, received the benefit of these fees and commissions (except those provided for in the Political Code, and which are not affected by the repealing act), the moneys thus accruing to the counties were the "fees and commissions allowed to or received by the auditor, assessor, collector, or treasurer." The intention of the repealing act, when considered in connection with the prior statutes, is, therefore, to relieve the state from the payment of all fees and commissions, except those allowed by the Political Code.

<sup>276</sup> It is further contended by appellant, that "assuming that the 'abolishing act of 1893' became a law, it was repealed by the county government act of 1893."

The act in question was approved February 23, 1893, and took effect the first Monday in May of that year. The county government act of 1893 was approved March 24, 1893. It is not claimed that the first-mentioned act was expressly repealed by the second, nor that the second expressly provided for the payment, by the state, of the fees and commissions here in controversy, but the contention is, that the first act was repealed by implication. We see no ground upon which a repeal by implication can be sustained; but a repeal of the "abolishing



act," if it were repealed by the county government act, whether expressly or by implication, would not revive the acts repealed by the "abolishing act"; and if the county government act re-established these fees and commissions, it must have done so by express enactment. The case of *San Luis Obispo County v. Felts*, 104 Cal. 60, 37 Pac. 780, cited by appellant, referred only to fees or percentages allowed by the Political Code, and which were expressly excepted from the operation of the abolishing act; nor does the case of *Goodwin v. Buckley*, 54 Cal. 295, have any application, since the county government act did not provide for the fees and commissions which appellant here seeks to recover.

In appellant's brief we find a statement of the amounts directed by the legislature to be raised for state purposes for five fiscal years there named, ending with that of 1897-98, and of the amounts actually collected and paid into the state treasury for the same years, from which it appears that the amount collected exceeds the amount directed to be raised by one million two hundred and forty-four thousand eight hundred and forty-seven dollars and fifty-four cents and the question is asked, "Does not this surplus money belong to the counties?" Whether it does or not is immaterial in this proceeding, as it was not included in petitioner's demand.

Appellant also refers to "An act authorizing the allowance, settlement, and payment of claims of counties against the state," approved March 9, 1893: Stats. 1893, p. 109. This statute did not create or fix any fees or charges against the state, but provided for the allowance of fees and commissions which, having been paid into the state treasury, might be allowed in the next settlement. There is no inconsistency between this act and the abolishing act previously passed, since <sup>277</sup> claims which had accrued to the counties prior to the repeal were not affected by it, and besides, "the abolishing act" expressly excepted from its operation certain fees or commissions therein named, to which the later act might properly apply.

Respondent refers to an act approved February 16, 1899 (Stats. 1899, p. 9), to prevent the maintenance of any action for the recovery of the fees and commissions such as are here in question, which provides that "all such actions and proceedings heretofore commenced and now pending, and all such actions or proceedings that may hereafter be instituted, shall be dismissed by the court in which the same may be pending,

upon its own motion"; but this act excepts the fees and commissions which were excepted by the said "abolishing act."

In view of the conclusion reached as to the validity of said "abolishing act," this act need not be considered.

We think the court below did not err in denying the writ, and advise that the judgment appealed from be affirmed.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Garoutte, J., Henshaw, J., McFarland, J., Van Dyke, J.

Temple, J., and Harrison, J., dissented.

Rehearing denied.

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**Statutes—Evidence of Enactment.**—It is held in *State v. Swan*, 7 Wyo. 166, 75 Am. St. Rep. 889, 51 Pac. 209, that a court has authority and it is its duty to examine the legislative journals to determine whether a statute was passed by a majority of the members elected to each house as required by the constitution. For an extended discussion of this question, see the note to *Carr v. Coke*, 47 Am. St. Rep. 814-823.

**The Repeal of a Repealing Act Revives the Act or common-law rule repealed:** *Baum v. Thoms*, 150 Ind. 378, 65 Am. St. Rep. 368, 50 N. E. 357; note to *Wharton v. State*, 94 Am. Dec. 219, 220.

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## FROST v. WITTER.

[132 Cal. 421, 64 Pac. 705.]

**PLEADING—AMENDMENTS—LIMIT TO RIGHT.**—All that is required in allowing amendments to pleadings is, that a wholly different cause of action, entirely foreign to the original, cannot be introduced thereby, and that a party cannot be allowed to strike out the entire substance and prayer of his pleading, and insert a new case by way of amendment.

**ACTIONS—CAUSE OF—DEFINITION.**—A cause of action is simply a right to enforce an "obligation," regardless of whether the action is *ex contractu* or *ex delicto*, or for compensation, or damages, or for restitution, or in *rem*, or in *personam*. The "cause of action" is to be distinguished from the "remedy," which is merely the means by which the "obligation" is effectuated, and it is also to be distinguished from the "relief" sought.

**PLEADING—AMENDMENT—CHANGE OF REMEDY.** An amendment to a pleading, not changing the "obligation" sought to be enforced, and only calling for an additional remedy, does not change the "cause of action."

**PLEADING — AMENDMENT — MORTGAGES.**—An amendment of a complaint in an action upon a note so as to set up a mortgage given as security for the note, and to seek its foreclosure, should be allowed. Such amendment does not wholly change the original cause of action, but merely cures a statutory defect in the complaint, and gives the plaintiff an additional remedy to enforce the obligation of the note.

**PLEADINGS — AMENDMENT — STATUTE OF LIMITATIONS.**—If an amendment to a complaint does not change the cause of action, the trial to which the statute of limitations runs is the filing of the original complaint.

**ACTIONS — PLEADINGS — MORTGAGES — FORECLOSURE.**—In an action on a note secured by mortgage, the plaintiff is compelled by the statute to set up the mortgage, unless the defendant waives the privilege of insisting upon the statute.

**MORTGAGES — LIEN OF — WHEN NOT BARRED AS TO MORTGAGOR.**—Although the lien of a mortgage is barred and extinguished as to the grantee of the mortgagor through the mortgagee's negligence, the obligation of the mortgage is not thereby extinguished as to the mortgagor, if the right of action is not barred as to him, and judgment may be taken against him on the principal obligation.

**APPELLATE PRACTICE — REFUSAL OF CONTINUANCE.** If it appears from the bill of exceptions that there was no error in refusing a continuance to the defendant, his affidavit cannot be resorted to on appeal to show otherwise.

**APPELLATE PRACTICE — REFUSAL OF REPORTER'S SERVICES.**—If the case is one in which a reporter's services could have been dispensed with without prejudice or inconvenience, and no reporter could be found, there is no error in refusing a motion for such services.

**EVIDENCE — ASSIGNED NOTE.**—The admission of an assigned note in evidence against its maker, as to whom it is not barred, is not error, although the assignment thereof is not dated. All objection to such assignment is waived when it is not urged that it was not made before the commencement of the suit.

**NEGOTIABLE INSTRUMENTS — EQUITABLE ASSIGNMENT.**—If a note is made payable to the cashier of a bank, and presumably to its use, upon his ceasing to be connected with the bank there is an equitable assignment of the note to the bank, and any subsequent formal assignment must relate to the time of the equitable assignment.

E. Graves, G. F. Witter, Jr., and R. R. Bigelow, for the appellant.

W. H. Spencer, for the respondent.

<sup>422</sup> SMITH, C. Appeal from a judgment for foreclosure of mortgaged premises and from an order denying defendant's motion for new trial.

The original complaint counted on a promissory note made <sup>423</sup> by the defendant to one Speyer, March 14, 1894, payable six months after date, and assigned to plaintiff. It was filed Sep-



tember, 12, 1898, two days before the lapse of four years from the maturity of the note. An amended complaint was filed September 16, 1898, which, in addition to the matter alleged in the original complaint, counted also on a mortgage of even date, executed by the defendant to secure the note, and also made one W. G. Witter a party, as claiming some interest in the mortgaged premises, etc.

The defendants each moved to strike the amended complaint from the files, on "the ground that [it] wholly changes the cause of action," and the motions were denied. The amended complaint was then demurred to on general grounds, and on the ground that the action was barred by the provisions of section 337 of the Code of Civil Procedure, and section 2911 of the Civil Code. The demurrer of the new defendant, W. G. Witter, was sustained on the latter ground; that of the original defendant, overruled.

The answer of the remaining defendant, besides a general denial and the plea of the statute, pleads affirmatively that by deed of date June 20, 1898, he had conveyed the mortgaged property to W. G. Witter, subject to the mortgage, and "that the plaintiff negligently and without the consent of [the] defendant . . . permitted the statute of limitations to run on said mortgage," etc. On this plea it is found that defendant deeded the land to W. G. Witter as alleged; and it appears from the ruling on demurrer that as to him the action was barred. On the issues raised by the general denial and the plea of the statute, the findings are for the plaintiff. Judgment in the usual form was accordingly rendered for the foreclosure of the mortgage and for the docketing of a deficiency judgment.

The principal questions involved relate: 1. To the refusal of the court to strike out the amended complaint; 2. To the overruling of the defendant's demurrer and plea of the statute of limitations; and 3. To the sufficiency of defendant's affirmative plea.

1. In considering the limit to the right of amendment, cases of amendment, at the trial, for variance under sections 470 and 471 of the Code of Civil Procedure are to be distinguished from amendments under sections 472 and 473. With reference to the former, an express limit is established by the statute; with reference to the latter, this is not the case. It is with the latter <sup>424</sup> class of amendments only that we are concerned here. Again, some distinction is perhaps to be made between amendments as of course, under section 472, and amendments allowed by the

court under section 473. But, in the absence of any restriction or qualification to the right of amendment under the former section, it may be assumed that it is at least as extensive as under the latter. Whether or not it is more extensive, it will be unnecessary in this case to inquire. The question will be regarded, therefore, as relating generally to the limit or extent to which the complaint may be amended under sections 472 and 473 of the Code of Civil Procedure.

On this point I find no general rule laid down by the decisions in this state. All that is said is, that great liberality should be used by the courts in allowing amendments (*Burns v. Scooffy*, 98 Cal. 276, 23 Pac. 86, and cases cited); and that the allowance of amendments is a matter within the discretion of the courts: *Coubrough v. Adams*, 70 Cal. 378, 11 Pac. 634; *Lestrade v. Barth*, 17 Cal. 288. And in practice the courts have been extremely liberal—as, e. g., in *Heilbron v. Heinlen*, 72 Cal. 376, where the complaint was amended so as to describe a different tract of land from that described in the original complaint; or in *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673, where the case was changed from an action at law to a case in equity; or in *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100, where the change allowed was from an action on a special contract to an action on a quantum meruit; or as in *Castagnino v. Balletta*, 82 Cal. 256, 23 Pac. 127, where the change was from an action on a mechanic's lien to an action on the special contract, or in *assumpsit*; or in *Bogart v. Crosby*, 80 Cal. 195, 22 Pac. 84, where the principal debtors, who had been omitted from the original complaint, were brought in by amendment.

In other states the decisions are conflicting: *Pomeroy on Code Pleading*, sec. 566. In one, and perhaps the most numerous, class of cases, the rule is established, says the author cited, that a party "cannot, under the form of an amendment, change the nature and scope of his action"; or, rather, as he adds in the same breath, "he cannot substitute a wholly different cause of action." The latter, however, is an essentially different proposition, and is the form in which the rule is commonly asserted—as, e. g., in *Shields v. Barrow*, 17 How. 144, and the Alabama cases cited in note to 1 *Encyclopedia of Pleading and Practice*, 425 463. And it is obvious that the unqualified way in which the rule is sometimes stated—i. e., that a new or different cause of action cannot be introduced by amendment—cannot be accepted. For the most common kinds of amendments are those in which complaints are amended that do not state facts suffi-

cient to constitute a cause of action; and in these, and often in the case of new parties, a new cause of action is in fact for the first time introduced. All that can be required, therefore (to use the language of Mr. Pomeroy), is, that "a wholly different cause of action" shall not be introduced; or, as said by the court in *Shields v. Barrow*, 17 How. 144, that "a complainant [is not] at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment," or "to strike out the entire substance and prayer of his bill, and insert a new case by way of amendment"; or, as expressed by this court in an early case, the matter of the amendment must not be "entirely foreign to the original complaint": *Nevada County etc. Canal Co. v. Kidd*, 28 Cal. 681. On the other hand, under statutory provisions similar to ours, the rule has been entirely repudiated by the court of appeals of New York, and it is there held to be immaterial whether the cause of action set out in the amended complaint is new or otherwise: *Brown v. Leigh*, 12 Abb. Pr., N. S., 193, and other cases cited; *Pomeroy on Code Pleading*, sec. 566, p. 649, note 1.

The rule has not been expressly adopted in any of the decisions in this state though the point that it had been violated has often been made, and overruled on special grounds—as, e. g., that the amendment did not "materially" change the cause of action: *Louvall v. Gridley*, 70 Cal. 510, 11 Pac. 777; or that the amendment did not state an "essentially" different cause of action: *Bogart v. Crosby*, 91 Cal. 281, 27 Pac. 630; or that the new matter was not "entirely foreign to the original complaint," as in *Nevada County etc. Canal Co. v. Kidd*, 28 Cal. 681. But the rule has not been affirmatively asserted in any of the decisions; and in the case last cited the court declined to consider the question whether a cause of action could be introduced by amendment different from the one originally alleged, "or, more properly speaking, attempted to be alleged." And this is in accordance with the cases cited supra, in each of which the cause of action set up in the amended complaint was more or less widely different from the original. For the purposes of this case, however, it may be assumed that the rule, in its <sup>426</sup> more liberal form—as stated in the cases cited—has been tacitly recognized; and the question to be considered will be regarded as relating simply to its application.

In applying the rule, some confusion has resulted from the neglect to define the terms, "cause of action" and "action," to which, therefore, our attention must be first directed.



The latter term is very commonly confounded with the suit (*litis*) in which the action is enforced. But this is not the technical meaning of the term, according to which an action is simply the right or power to enforce an obligation. "An action is nothing else than the right or power of prosecuting in a judicial proceeding what is owed to one"—which is but to say, an obligation. (*Actio nihil aliud est quam jus persequendi in iudicio quod sibi debetur.*) The action, therefore, springs from the obligation, and hence the "cause of action" is simply the obligation. This is in accordance with the view of Mr. Pomeroy, though expressed by him in new and somewhat awkward terms: Pomeroy on Pleading and Practice, sec. 453.

The obligation thus constituting the cause of action may be either *ex contractu* or *ex delicto*; and again, the latter may be either for compensation or damages, or for restitution—as, e. g., the obligation of a wrongdoer to restore the property of another. For, though there is a distinction between actions brought for the recovery of damages or compensation and those brought for restitution—the latter constituting actions *in rem*, and the former actions *in personam*—yet in either case the action is to enforce an obligation; nor can there be an action for any other purpose: 1 Austin on Jurisprudence, sec. 527.

The "cause of action" is therefore to be distinguished, also, from the "remedy"—which is simply the means by which the obligation or the corresponding action is effectuated—and also from the "relief" sought: Pomeroy on Pleading and Practice, sec. 453.

Applying these definitions to the case at bar, it is clear that the cause of action set up in the original and that set up in the amended complaint was simply the obligation sought to be enforced—that is to say, the obligation to pay the money agreed to be paid—and that the only change that took place was in the remedy by which it was sought to enforce the obligation.

<sup>427</sup> This was the view taken in *Lackner v. Turnbull*, 7 Wis. 105 (affirmed in *Ball v. McGeoch*, 78 Wis. 359, 47 N. W. 610), where the original complaint was in *assumpsit* for work and labor, and the plaintiff was permitted to set up in an amended complaint a mechanic's lien, the court saying: "We do not think that, in strictness, the amendment which was made in this case did change the cause of action. It only changed the remedy; . . . but the 'cause of action,' or in other words, the labor performed and materials furnished [and it should be added, the corresponding obligation] were the same, whether the plain-

tiff proceeded under the original or amended complaint. By amending his complaint he was enabled to obtain relief which he would not have been entitled to under the original complaint, but the 'cause of action' was not changed by the amendment." In the present case, the cause of action was the obligation to pay the note, to which the mortgage was merely an incident: *Storch v. McCain*, 85 Cal. 307, 24 Pac. 639. The original complaint was defective only by reason of failure to set up the mortgage, which, by a technical statutory rule, was necessary. The amendment simply cured this defect, and the effect of the judgment was simply to give to the plaintiff what he originally demanded, and some additional relief, which, though necessary under the statute, was of no value.

The case, therefore, comes within the rule. Nor is this decision in conflict with *Ramirez v. Murray*, 5 Cal. 222, and *Hackett v. Bank of California*, 57 Cal. 335, cited by appellant's counsel. These cases did not refer to amendments under section 472 or section 473 of the Code of Civil Procedure, but to amendments at the trial for variance, which are governed by a different rule: Code Civ. Proc., secs. 470, 471; Practice Act, 579, 71. Nor is the cause of action here changed from tort to contract, or vice versa, as in those cases.

2. It follows there was no error in overruling the defendant's demurrer, or his plea of the statute. Where the cause of action is not changed, the time to which the statute of limitations runs is the filing of the original complaint: *Lorenzana v. Camarillo*, 45 Cal. 125; *Easton v. O'Reilly*, 63 Cal. 308; *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; *Vanderslice v. Matthews*, 79 Cal. 273, 21 Pac. 748; *Smith v. Bellows*, 77 Pa. St. 441; 1 Am. & Eng. Ency. of <sup>428</sup> Law, 551, and note. The cases cited by appellant's counsel are not in conflict with this view. In each of them the causes of action in the original and in the amended complaint were different, or assumed to be different; *Anderson v. Mayers*, 50 Cal. 525; *Atkinson v. Amador etc. Canal Co.*, 53 Cal. 105; *Meeks v. Southern Pac. R. R. Co.*, 61 Cal. 149. The decision in *California Sav. Bank v. Parrish*, 116 Cal. 259, 48 Pac. 73, refers to the filing of a cross-complaint by the defendant.

Nor is the case affected by the provisions of section 2911 of the Civil Code. A lien may be extinguished by the extinction of the principal debt, but the contrary does not follow. Nor, even were it extinguished, would that prevent a judgment on the principal obligation. The contrary has been expressly held:

Mechanics' etc. Assn. v. King, 83 Cal. 440, 442, 444, 23 Pac. 376; Beatty, C. J., in Hearn v. Kennedy, 85 Cal. 57, 24 Pac. 606. The plaintiff was compelled by express statutory provisions to set up the mortgage, but it was for the defendant to waive the privilege, if he desired; and the maxim would apply, "*Volenti non fit injuria*." But here, if there were error in foreclosing the mortgage—and I hold the contrary—no harm was done; for the defendant had parted with his interest.

3. In the affirmative defense set up by the defendant it is claimed that by the negligence of the plaintiff in suffering the mortgage to be barred as to the defendant's grantee, the obligation of the defendant was extinguished; but I know of no principle of equity on which this claim can be maintained. A surety may sometimes be released by failure to pursue the principal with due diligence; but the converse is not true. The case of *Hibernia Sav. etc. Soc. v. Thornton*, 109 Cal. 427, 50 Am. St. Rep. 52, 42 Pac. 447, cited by appellant, has no application. In that case the action was brought on the note alone, and the decision was simply an application of the rule established by other decisions in this state, that the mortgagee "is not authorized to waive the security and to bring an action on the indebtedness." Had the mortgage been set up, whether it had become valueless by neglect or otherwise, the result would have been different: *Mechanics' etc. Assn. v. King*, 83 Cal. 440, 23 Pac. 376. It will be observed, also, that the principal case, and the cases therein cited, involve simply the construction of section 1475 and cognate sections of the Code of Civil Procedure, and hence <sup>429</sup> have no application to the case here, where the same questions are involved.

Other points made by the appellant's counsel are: 1. The refusal of the court to grant a continuance; 2. The denial of the defendant's motion for a reporter; 3. The admission of the note in evidence, and the alleged insufficiency of the evidence to show that the assignment was made to the plaintiff before the beginning of the suit. With regard to the first point, it will be sufficient to say that, on the facts shown by the bill of exceptions, there was no error, and that resort cannot be had to the affidavit of the defendant to show the contrary. With regard to the second, as the reporter could not be found, the motion could not be granted. Whether it was error in the court to proceed without the reporter need not be determined. The case was one in which the reporter's service could very well be dispensed with without inconvenience, and it is at least



clear that no harm could have resulted. As to the admission of the note, the objection, I think, was not sufficiently definite. The note was not barred by the statute; and it was immaterial whether or not the assignment was dated. It was not objected that it did not appear that the assignment was not made before the beginning of the suit; nor was the witness asked that question. As to the evidence—in the absence of any evidence to the contrary—it was sufficient to justify the finding. The note was to Speyer, "Cashier of Paso Robles Bank," and presumably for its use, and on his ceasing to be connected with the bank in the year 1895, there was at least an equitable assignment to the equitable owner. Inferentially, the formal assignment was made about that date, and at all events would relate to it.

I advise that the judgment and order appealed from be affirmed.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Henshaw, J., Temple, J.

Hearing in bank denied.

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**Pleadings—Amendment of.**—The only limitation on the power of courts to allow amendments under the code system of pleading is, that no vested right shall be disturbed, and that the cause of action shall not be changed substantially: *Brown v. Mitchell*, 102 N. C. 347, 11 Am. St. Rep. 748, 9 S. E. 702. On amendments changing the cause of action, see the monographic notes to *Flanders v. Cobb*, 51 Am. St. Rep. 414-435; *Stevenson v. Mudgett*, 34 Am. Dec. 158-162.

**Limitation of Actions.**—When an amendment to a declaration sets up no new matter or claim, but merely restates in a different form the cause of action, it relates to the commencement of the suit, and the statute of limitations is arrested at that point. When the amendment introduces a new or different cause of action, it is treated as a new suit begun at the time when the amendment is filed: *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278, 37 N. E. 247. See, also, the note to *Flanders v. Cobb*, 51 Am. St. Rep. 430, 431.

**CHALMERS v. SHEEHY.**

[132 Cal. 459, 64 Pac. 709.]

**APPELLATE PRACTICE—TRANSCRIPT—OBJECTION TO VERIFICATION OF ANSWER.**—If there is no motion to strike out the answer, and the parties go to trial on the pleadings without objection, an objection that the answer was not verified cannot be made for the first time on appeal, although the clerk's certificate to the transcript on appeal is insufficient to show that the answer was in fact verified.

**APPELLATE PRACTICE—ALLEGATIONS OF FRAUD—WAIVER OF OBJECTIONS.**—If there is no special demurrer to the answer in an action, in the absence of which its allegations of fraud are sufficient, and the case is tried on the assumption that the issue of fraud is properly pleaded, an objection that the allegations of fraud were not properly pleaded is waived, and cannot be urged on appeal.

**FRAUDULENT CONVEYANCES—LIMITATIONS.**—The statute of limitations does not begin against one who has acquired a right, by virtue of a sale under execution against a husband, to set aside a previous fraudulent conveyance from such husband to his wife, until the date of the sheriff's deed under the execution.

**NEW TRIAL.—NEWLY DISCOVERED EVIDENCE** which is merely cumulative, or designed to contradict a witness, is not ground for a new trial.

**NEW TRIAL.—ACCIDENT OR SURPRISE**, growing out of enforced changes of counsel during the progress of the case, is not ground for the reversal of an order denying a new trial when it does not appear that there has been any miscarriage of justice nor abuse of discretion.

**FRAUDULENT CONVEYANCES—ACTION IN TORT.** One who has a cause of action in tort is a creditor of the tortfeasor before the commencement of the action thereon, as well as after, and as such creditor is, upon recovering judgment, entitled to avoid a fraudulent transfer antedating the commencement of the action.

**FRAUDULENT CONVEYANCES—ACTION IN TORT—HUSBAND AND WIFE.**—If a husband makes a gift of all of his property to his wife, pending an action for slander against him, with intent to defeat any judgment recovered against him, the plaintiff may, upon recovering such judgment, assail such gift as fraudulent.

**FRAUDULENT CONVEYANCES—FRAUD OF HUSBAND—INNOCENCE OF WIFE.**—If a husband makes a fraudulent gift of all of his property to his wife, with intent to defeat any judgment recovered in a pending action for slander, the plaintiff, upon recovering such judgment, may assail the gift as fraudulent, and the fact of the innocence of the wife from any participation in the fraud, or that she did not know the condition of her husband's business affairs, is immaterial.

J. J. Dunne, for the appellants.

Sullivan & Sullivan, for the respondent.

**460** CHIPMAN, C. Action to quiet title. Sheehy alone answered, and is the sole defendant. The court adjudged that plaintiff Mary D. Chalmers and defendant James Sheehy were owners, as tenants in common, of an equal undivided one-half interest in and to the premises in controversy, and that plaintiff Ella T. Chalmers had no interest therein. Plaintiffs appeal from the order denying their motion for a new trial on a statement of the case. It was admitted at the trial, and the court found, that plaintiff Mary D. Chalmers was the owner of all the interest claimed by her. We do not see, therefore, that the appeal concerns her. The real issue is as to the ownership of the remaining undivided one-half interest in the property.

Sheehy commenced an action against Chalmers on March 1, 1892, in the superior court of the city and county of San Francisco, for an alleged slander, laying his damage at fifty thousand dollars. The cause was tried in May, 1894, by a jury, and Sheehy had a verdict against Chalmers for two **461** thousand dollars, and judgment was accordingly entered on May 18, 1894. A transcript of the judgment docket was filed for record, May 21, 1894, in the office of the county recorder of Santa Cruz county, where the land in question is situated; execution duly issued on said judgment, and was received by the sheriff of Santa Cruz county, who duly levied upon Chalmers' interest in the land on June 4, 1896, resulting in the sale, by the sheriff, to Sheehy, on October 19, 1896, of all the title and interest of Chalmers in and to the said premises for the amount of the judgment, costs, and accrued interest. There being no redemption, the sheriff duly executed his deed of the premises to Sheehy on April 21, 1897. Sheehy claims title under this deed. Plaintiff Ella claims title under deed of gift from her husband, dated October 3, 1893, after Sheehy had commenced his slander suit against Chalmers, but before judgment in that action. The motion for a new trial was made on the grounds: 1. Irregularity in the proceedings; 2. Accident and surprise; 3. Newly discovered evidence; 4. Insufficiency of the evidence; 5. Errors in law occurring at the trial.

1. Appellants make the point that the transcript does not show that the answer was verified. No verification appears in the printed copy of the answer. In the clerk's certificate, however, it is stated that the transcript was correct, "with the exception of the following, to wit, . . . the affidavit of James



Sheehy, verifying the answer in said action." There was no motion to strike out the answer, and the parties went to trial on the pleadings without objection. Conceding the clerk's certificate to be insufficient to show that the answer was in fact verified, it is too late to urge the objection here for the first time. It is also objected that the allegations of fraud in the answer, impeaching the deed from Chalmers to his wife, are not sufficiently specific. There was no demurrer to the answer, in the absence of which the allegations were sufficient. The case was tried on the assumption that the issue of fraud was properly pleaded.

2. Appellants also make the point that Sheehy's right to have the transfer to Mrs. Chalmers set aside is barred by the three years' statute of limitations: Code Civ. Proc., sec. 338, subd. 4. This contention rests upon the claim that the statute began to run from the date of Chalmers' deed to his wife, October 3, 1893.

462 The present cause of action did not accrue to Sheehy until he had obtained the judgment in the slander suit, and had caused the premises to be sold in execution thereof; and hence the statute, as to him, did not begin to run at the date of Mrs. Chalmers' deed, but at the date of the sheriff's deed to Sheehy: *Hager v. Shindler*, 29 Cal. 47; *Stewart v. Thompson*, 32 Cal. 260; *Goodnow v. Parker*, 112 Cal. 437, 44 Pac. 738. The point was directly decided in *Stewart v. Thompson*. The cases are reviewed in *Goodnow v. Parker*, and *Stewart v. Thompson* cited approvingly.

3. The grounds much relied on for reversal are newly discovered evidence, and accident and surprise. The alleged newly discovered evidence referred to in the affidavits is not set out. It is alleged to consist of statements previously made by Sheehy and one Horgan in another action pending between Sheehy and Chalmers, contradictory of their testimony in this action, but of which affiants had no knowledge at the latter trial. Judging from what is stated in the affidavits, it is impeaching evidence, for it is stated to be intended to contradict testimony given by Horgan and Sheehy in the present action. The rule is, that newly discovered evidence which is merely cumulative, or designed to contradict a witness, is not of a character to warrant a new trial: *People v. Anthony*, 56 Cal. 397.

Upon the question of accident and surprise, the affidavits and counter-affidavits are very lengthy, and embrace the history not only of the trial of the present case, but much of that relating

to the action for defamation of character out of which the defense in this action arose.

An examination of the numerous affidavits shows that appellants relied on the alleged fact that the cause was not fairly or fully or properly presented to the court, on account of the abandonment of the case, at a critical moment, by plaintiff's attorney, Mr. Eugene Deuprey, who had defended Chalmers in the slander suit and had prepared the present cause for trial. It is set forth in plaintiffs' affidavit that Mr. Deuprey was fully paid for his services, but, because of other important engagements, refused to attend to this present case, and that plaintiffs were compelled to employ counsel unfamiliar with the law and the facts, in consequence of which the cause was not tried as it should have been on plaintiffs' behalf; that the firm of Smith & Murasky was retained as substitute <sup>403</sup> attorneys, and that Mr. Smith of that firm attended at the trial, but that about that time he was appointed colonel of the First California Infantry Volunteers, which made it necessary for Mr. Murasky, his partner, to take up the case without any previous knowledge of it, and prepare the brief for plaintiffs after the cause was submitted to the court; that Mr. Murasky was a candidate for an office about that time, and was elected, and he, too, gave up the case after he had prepared and submitted his brief, and the statement and motion had to be prepared by his successor, the present counsel.

It is no doubt true that enforced changes in counsel during the progress of a case sometimes are most unfortunate, although not always necessarily so. We think, however, that the facts as shown to the court warranted its conclusion that no injury resulted to plaintiffs' cause by a change of counsel, and that plaintiffs were not wholly blameless for Mr. Deuprey's withdrawal from the case. Mr. Deuprey made affidavit that the trial was continued once at his request, and that, before the day of trial arrived, he demanded a fee for his services, which was refused on the ground that he had been amply paid in the slander suit, and ought not to expect pay in this action. He refused to take plaintiffs' view of the matter, but nevertheless accompanied Mr. Smith to Santa Cruz and took part in the trial at the day fixed. He deposed that he imparted to Mr. Smith fully all the facts relating to the litigation and the law involved, as he understood it, and that Mr. Smith was fully equipped to conduct the case. A further continuance became necessary, and because his clients refused him any compensation in this action, Mr. Deuprey drew out of the case and Mr. Smith

conducted it to the close of the evidence, when it was submitted upon briefs to be thereafter prepared. It was at this point he became colonel of the First California, although his regiment was not mustered in for several months thereafter, during which time it is shown that he continued in active practice. The first day of the trial was July 17, 1897, and the cause was then continued to September 8, 1897, giving Mr. Smith ample time for preparation. The testimony was written out, and placed in his hands September 23, 1897, and his regiment was not mustered in until the following April.

In an affidavit by Matt I. Sullivan, Esq., one of the attorneys for defendant, it is stated that the cause was continued the second time, by agreement, to July 31st, and from time to ~~404~~ time, for the mutual accommodation of counsel, until September 8, 1897, when "Colonel Smith appeared alone as counsel for plaintiffs, announced himself as ready to proceed with the trial, made no suggestion whatever indicating surprise or accident, made no motion for a continuance, but proceeded with the case in a manner indicating that he was fully prepared to represent his clients"; that the cause was submitted to the court upon the evidence, upon briefs to be prepared and sent to the court. Affiant further stated that Colonel Smith was actively engaged in the practice of law in San Francisco for several months after the submission of the case, to affiant's personal knowledge.

The briefs found their way to the court in July, 1898, and the findings were filed and the judgment entered on August 19, 1898. There is no satisfactory explanation of Colonel Smith's failure to brief the case. With the transcript before him, and an opportunity to consult with Colonel Smith about the case after the trial, if not before, it is not likely that plaintiff's case failed to be well and fully presented by Mr. Murasky. All the matters, of which the foregoing is a brief summary, were submitted on the motion to the trial judge, who was in a position to determine whether there had been any miscarriage of justice. A careful examination of all the facts, the salient features of which have been given, fails to convince us that there was any abuse of discretion in denying the motion.

4. The court found that the deed of Chalmers to his wife "was without consideration whatever, and was made with intent to hinder, delay, and to defraud said defendant Sheehy of his demand against said William P. Chalmers, and was made in anticipation of judgment that might be rendered against said William P. Chalmers in said action of Sheehy v. Chalmers" (the



slander suit). It was further found that at the time the transfer was made, Chalmers owned no property, except his interest in the land in dispute, out of which execution could be satisfied in whole or in part, and that Chalmers "is now, and at the time the transfer was made, and until said sheriff's sale, was, without any property whatever, other than said" interest, and that the deed to plaintiff Mrs. Chalmers "is void as against said defendant James Sheehy."

Appellants insist that the evidence does not support these findings. Appellants claim the law to be, "that no third <sup>465</sup> party can question the validity of a conveyance from the husband to the wife, unless he was a creditor of the husband before the conveyance was made, or was a subsequent purchaser without notice"; that the slander suit had not been tried when Chalmers executed the deed, and Sheehy, therefore, was not a creditor within the statute of frauds. It is also contended that there was no evidence of Mrs. Chalmers' participation in or knowledge of the fraud of her husband, if it be conceded that he acted fraudulently, and therefore the decision was erroneous.

Mr. Freeman says "that one having a claim for a tort is a creditor before the commencement of an action thereon, as well as after, and, as such creditor, is, upon recovering judgment, entitled to avoid a fraudulent transfer antedating the commencement of his action": Freeman on Execution, 4th ed., sec. 137a. See Bump on Fraudulent Conveyances, secs. 502, 503; Waite on Fraudulent Conveyances, 3d ed., sec. 90; 8 Am. & Eng. Ency. of Law, p. 750. See, also, sections 3429 and 3430 of the Civil Code, as to who are creditors and debtors, and *Melvin v. State*, 121 Cal. 16, 53 Pac. 416, where it is said that the term "debt," used in our statutes, "should be given its modern legal significance, as including any sort of obligation to pay money." The cases are very numerous where it is held that a cause of action based upon a tort is within the statute against fraudulent conveyances, and that a person having such a cause of action is a creditor of the wrongdoer before judgment is obtained. The following are cases where it was so held, and where the liability was for slanderous words: *Walradt v. Brown*, 1 Gilm. 397, 41 Am. Dec. 190; *Lillard v. McGee*, 4 Bibb, 165; *Langford v. Fly*, 7 Humph. 585; *Shean v. Shay*, 42 Ind. 375, 13 Am. Rep. 366; *Jackson v. Myers*, 18 Johns. 425; *Boid v. Dean*, 48 N. J. Eq. 193, 21 Atl. 618; *Cooke v. Cooke*, 43 Md. 522; *Miller v. Dayton*, 47 Iowa, 312.

The principle has been applied to other forms of torts or causes of action arising ex delicto, and it is held that the injured party becomes a creditor when the cause of action accrues: *Bongard v. Block*, 81 Ill. 186, 25 Am. Rep. 276; *Petree v. Brotherton*, 133 Ind. 692, 32 N. E. 300; *Weir v. Day*, 57 Iowa, 84, 10 N. W. 304; *Schaible v. Ardner*, 98 Mich. 70, 56 N. W. 1105.

Appellants' contention that participation in the fraud on <sup>466</sup> the part of the grantee, Mrs. Chalmers, must be shown, is equally untenable, for it is not pretended that the deed to her was other than a gift, pure and simple, and there is evidence to sustain the finding that Chalmers was then, and has been since, unable to meet his liabilities, and owned no property at the time of or since the execution, levy, and sale to Sheehy, other than the land in dispute. The facts are unlike those in *Cook v. Cockins*, 117 Cal. 140, 48 Pac. 1025, and other cases cited by appellants.

It is immaterial that Mrs. Chalmers was innocent (*Judson v. Lyford*, 84 Cal. 505, 24 Pac. 286), or that she did not know the condition of her husband's affairs: *Threlkell v. Scott* (Cal., Nov., 1893), 34 Pac. 851. When on the witness-stand, Chalmers was unable to state when he first informed his wife that he had made the deed to her, and was unable to say that he at any time made a manual delivery of it to her, and he stated that he did not know who deposited the deed for record, and he testified that he thought it was prepared in the office of Mr. Deuprey, who was his attorney in the slander suit. As a reason for making the conveyance, he testified that he was advised by another physician to do so, "to avoid the unforeseen consequences of a suit for damages," which it was explained was likely to arise in any physician's surgical practice; but when on cross-examination he was asked if he had been personally threatened with any suit prior to October 3, 1893, on account of any operation performed by him, or on account of any medical treatment of any patient, he could give but one instance, which was the threat of Sheehy to sue him, and that was, not for alleged malpractice, but for falsely circulating a defamatory report concerning Sheehy.

It appeared that Sheehy had loaned Chalmers money, and held his note for one thousand and fifty dollars; that, being called on for payment, Chalmers informed Sheehy that he was unable to pay it without mortgaging his interest in the land in dispute, and that he did not want to do that. Sheehy, however, brought suit and attached this land, and the debt was af-

terward paid. It is in evidence that, immediately following this suit, which was brought December 1, 1891, Dr. Chalmers made threats that he would blast the reputation of Sheehy; he circulated the story that he had treated Sheehy for a loathsome disease, and on December 3d brought suit against Sheehy for two thousand dollars for medical services, alleged to have been rendered in <sup>467</sup> treating him for a constitutional disease, and there is evidence tending to show that this was by way of reprisal, and was without merit, for a jury gave Sheehy the verdict, and he recovered judgment for costs. Sheehy promptly brought his action for defamation of character, upon learning of the reported slanderous statements by Chalmers. A witness, who had known Chalmers many years, and had been his friend up to the commencement of the slander suit, testified: "I had a conversation with Dr. Chalmers after the commencement of the slander suit, and before October 3, 1893, in relation to the slander suit. . . . He came to my office one night at 8 o'clock, and stayed there until 12 o'clock, and we talked over different matters, and among other things talked over this slander suit. . . . I told him he was very foolish, and would have to pay for it in the end—that he had property—and then he remarked, 'He will never get a damned cent of my property. I will fix it so that he will never get a dollar out of it.'"

Other facts appeared, showing that the court was justified in believing that Chalmers' intention was to put the property where Sheehy could not reach it, should he recover; and as it was all the property he had, he would thus prevent Sheehy from collecting anything if he succeeded in obtaining judgment. If we could assume the law to be as claimed by appellants, Chalmers' deed to his wife might have accomplished its evidently fraudulent purpose, but as the law is otherwise, we must hold the effort to have been abortive; the deed was void, and the court did not err in so finding.

There are no errors of law alleged to have occurred at the trial which seem to call for special notice.

The order should be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed.

Harrison, J., Van Dyke, J., Garoutte, J.

Hearing in bank denied.



**Fraudulent Conveyance.**—Where a defendant, in an action for slander, after the words are spoken, but before the action is brought, conveys his land without consideration to defeat any judgment that the plaintiff may recover, the conveyance is fraudulent: *Shean v. Shay*, 42 Ind. 375, 13 Am. Rep. 366. See, also, *Helms v. Green*, 105 N. C. 251, 18 Am. St. Rep. 893, 11 S. E. 470.

**Fraudulent Conveyance.**—The statute of limitations in an action to subject property to the payment of plaintiff's judgment does not begin to run at the date of the conveyance, but only on the recovery of the judgment: *Brown v. Campbell*, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433. See, further, *Weaver v. Haviland*, 142 N. Y. 534, 40 Am. St. Rep. 631, 37 N. E. 641.

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## ESTATE OF FAIR.

[132 Cal. 523, 60 Pac. 453, 64 Pac. 1000.]

**TRUSTS, WHAT FORBIDDEN.**—An express trust to convey real property is, in California, void, because forbidden by its Civil Code.

**WILLS—CONSTRUCTION.**—In construing a will, technical informalities, or grammatical errors, or words which, in legal language, are inapt to express the evident intention of the testator, must be construed as though the proper legal phraseology had been employed; but there must be some language to effectuate that which a litigant claims to have been the intention of the testator.

**WILLS—CONSTRUCTION—INTENTION OF TESTATOR.** In construing a will the intention of the testator must be found in the will itself, and is not to be collected by conjecture dehors the will. If the language of the instrument is unambiguous and perfectly clear, there is no field for the play of construction. If the testator has clearly expressed one intention, the court cannot impute to him another, but the intention must clearly appear to be lawful. The court can, in no instance, make a new will for the testator.

**TRUSTS—SEPARATION OF VOID AND VALID PROVISIONS.**—If an estate is created subject to several trusts, one of which is void, and the other valid and legally separable from the other, the estate vests, unaffected by the void trust; but if the creation of the estate depends upon the execution of a void trust, it can never come into existence.

**WILLS—CONSTRUCTION—TRUSTS.**—Whether there is in a will a direct grant of remainders, or a mere trust to convey at a future time, so that no estate is to vest until the execution of the conveyance, is to be determined by the intention of the testator as expressed in his will.

**TRUSTS AND USES—ESTATE VESTING IN BENEFICIARY—EXECUTION OF INVALID TRUST.**—Under the California statute of uses and trusts, no legal estate vests in the beneficiary, and under any view of such statute an invalid trust to convey cannot be deemed executed. The English statute of uses

being repugnant to, and inconsistent with, the whole system of conveyancing and registry in force in such state, is not in operation therein.

**TRUSTS IN WILLS—INVALID DEVISE IN TRUST TO CONVEY.**—A trust created by will in trustees to transfer and convey real property to named beneficiaries is void, and cannot be construed as creating an estate in remainder in the beneficiaries in the absence of other words in the will, which, without the aid of the invalid trust, would devise any estate to such beneficiaries.

**TRUSTS UNDER WILLS—INVALID TRUST TO CONVEY—ESTATES IN REMAINDER.**—Rules applicable to vested remainders, under valid devises, do not apply where there is no such devise, but only a trust to convey, vesting no present estate in the beneficiaries, who may be alive at the time contemplated for the conveyance under the trust, and who can acquire no right other than one to enforce the execution of such conveyance.

**TRUSTS.—POWER IN TRUST TO CONVEY** is a trust to convey, within the meaning of the California statute of uses and trusts, and, not being within any category of valid trusts enumerated in such statute, is thereby forbidden and void.

**TRUSTS—SEPARATION OF VALID AND INVALID.**—An invalid trust to convey to certain beneficiaries who shall be living at the time of the conveyance, after the expiration of a trust for the lives of the testator's children, carries with it the otherwise valid trust for the lives of such children, and renders the whole trust void.

**WILLS—SEPARATION OF VALID AND INVALID CLAUSES.**—If there are valid and invalid clauses in a will, the valid ones cannot stand if the invalid ones are so interwoven therewith that they cannot be eliminated without interfering with and changing the main scheme of the testator.

**WILLS—CONSTRUCTION.**—If the language of the provisions of a will is plain and unambiguous, courts are not permitted to wrest it from its natural import in order to save it from condemnation. Courts cannot force the construction of a sentence, or even a word, in order that a particular result may be reached.

**WILLS—CONSTRUCTION—EXPRESSED INTENT CANNOT BE CHANGED.**—The legal effect of the expressed intent of a testator in his will cannot be varied under the guise of correction, because he misapprehended its legal effect. If only an illegal mode of executing the intent is expressed, the court cannot substitute a legal mode.

**TRUSTS—POWER TO CREATE—VOID TRUST TO CONVEY.**—The power conferred by statute upon the creator of a trust to "prescribe to whom the real property to which the trust relates shall belong in the event of the failure or termination of the trust," and to "transfer or devise such property subject to the execution of the trust," does not authorize a void trust to convey property to be transformed into a valid trust not otherwise in any manner expressed.

**WILLS—TRUSTS DISINHERITING CHILDREN.**—The law does not favor the tying up of vast estates by will for a long period by trusts or schemes which include the disinheritance of the testator's children.

Pierson & Mitchell, W. M. Pierson, R. Y. Hayne, G. W. McEnerney, V. R. Paterson, Rodgers & Paterson, and J. L. Robinson, for the appellants.

Knight & Heggerty, Garber, Boalt & Bishop, J. Garber, C. S. Wheeler, Wilson & Wilson, W. F. Herrin, H. L. Gear, and Lloyd & Wood, for the respondents.

**525** GAROUTTE, J. This is an appeal from a decree of partial distribution.

Upon the former decision of this case, Mr. Justice McFarland rendered the following opinion, which is now adopted as the opinion of the court upon the questions therein discussed:

"It seems to be necessary, at the expense of brevity, to state the fifteenth clause of the will here in full. By the preceding clauses a large number of legacies in money are given to various persons, consisting mainly of brothers and sisters of the decedent, and certain of their children. The said fifteenth clause—and we put in italics the words which are most important in arriving at a conclusion—is as follows:

"Fifteenth. All the rest, residue, and remainder of my estate, property, and effects, real, personal, and mixed, whatsoever, and wheresoever situated, I give, devise, and bequeath unto my trustees hereinafter named, and to the survivors of them, and to their successors in office, *in trust, for the following uses and purposes*; that is to say:

"To have and to hold the same, in trust, during the lives of my daughters, Theresa A. Oelrichs and Virginia Fair, and of my son, Charles L. Fair, and during the life of the survivor of them, and upon the death of such survivor *to transfer and convey* to the children or descendants of my said daughter **526** Theresa the one-fourth part of said trust property and estate, and to the children or descendants of my said daughter Virginia the one-fourth part of said trust property and estate, and the remaining one-half of said trust property and estate *to transfer and convey*, in equal shares, to my brothers and sisters, and to the children of any deceased brother or sister by right of representation. (The language of this clause is taken from the Civil Code of the state of California, section 1386, subdivision 3, as it now exists, and shall bear the same construction as said subdivision of said section, subject, however, to the provisions of paragraph 'sixteenth' of this will.) In case either of my daughters die, leaving no children, or descendants, the one-fourth part of said trust property and estate herein directed to be



*transferred and conveyed* to her children or descendants *shall be transferred and conveyed* to the children or descendants of my other daughter, and if there be none, the same *shall be transferred and conveyed* to my brothers and sisters, and to the children of any deceased brother or sister by right of representation, as aforesaid.

“In trust, further, during the life or lives of my said daughters and son, and the survivor of them, to hold, manage, and control the said trust property and estate, and monthly to pay over the net income derived therefrom to my said daughters and son in equal proportions, and upon the death of either of my said daughters, to pay over the one-third of said net income to which she, if living, would be entitled, to her children or descendants, if any there be, otherwise to my surviving daughter, and upon the death, during the life of my said son, of said surviving daughter, leaving children or descendants, then to her said children or descendants, and if she leaves no children or descendants, then said portion of said net income to become a part of the rest and residue of my estate, and to be disposed of as such under the provisions of this will, and upon the death of my said son, to pay over the one-third of said net income to which he, if living, would be entitled, to my said two daughters, in equal proportions, or to the survivor of them.’

“One or two of the other clauses of the will should be briefly noticed. By the seventeenth clause the appellants Angus and others are declared to be the trustees mentioned in the fifteenth clause; and they are authorized to sell any of the trust property, to invest and reinvest the proceeds of sales, to <sup>527</sup> apply the proceeds to the improvement of other portions of the property, to purchase or acquire other property, to lease any portion of the property, and to borrow or lend such money as they may deem advisable, and to secure repayment of loan by mortgage and other liens, to make compromises and settlements, and to handle the property generally as they may see fit. By clause nineteenth, it is provided that in case of the death, resignation, etc., of any one of the trustees, the remaining trustees, or any two of them, shall have authority to fill the vacancy by a declaration in writing, ‘and the title to the trust property and estate shall vest in such new trustee, jointly with the others, without the necessity of formal or any conveyance to such new trustee.’ By clause twenty-one the testator declares as follows: ‘I make no provision for any children of my son, Charles L. Fair, whether born before or after this will, nor any provision for my

said son, Charles L. Fair, other than that provided in the "fifteenth" (15) paragraph hereof.' It may be, perhaps, necessary to hereafter mention some of the other clauses of the will.

"In determining whether or not the trusts declared in the fifteenth clause are valid, the primary and most important consideration is, that an express trust to convey real property to beneficiaries is not lawful under the statutes of this state, but is by such statutes forbidden. The main contentions of appellants are based upon the invalidity of such a trust, although in some of their arguments they do contend that such a trust is valid. Clearly, however, such a trust is made by our code invalid. Our law upon the subject shows an intent to avoid the intricacies, frauds, and concealments which were possible under the old system of trusts and uses, whereby the title to real property was allowed to be in one person and the beneficial use in another, to such an extent that the confusion following was intolerable; and the purpose of the code provisions is clearly to confine trusts within very narrow limits, and to allow them only in a few instances where they might be specially used to subserve proper and necessary purposes. Section 847 of title 4 of the Civil Code provides as follows: 'Uses and trusts in relation to real property are those only which are specified in this title'; and section 857, in the same title, is as follows: 'Express trusts may be created for any of the following purposes.' Then follow four subdivisions, providing the purposes for which express <sup>528</sup> trusts may be created, and neither of them includes a trust to convey real property, except only as it may be an incident to the trust 'to sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust.' And as a trust to convey real property to beneficiaries was one well recognized by the common law, it is quite clear that these provisions of the code were intended to abolish, and do abolish, such a trust. Therefore the attempted declaration of trust, in the decedent's will, to 'transfer and convey,' so far as real property was intended to be affected thereby, was void (and real property, only, is involved in this case): *Bennack v. Richards*, 116 Cal. 406, 48 Pac. 622; *In re Walkerly*, 108 Cal. 656, 49 Am. St. Rep. 97, and note, 41 Pac. 772.

"Our provisions about uses and trusts are clearly taken from those of New York on the same subject. Section 857 of our code is nearly identical with section 55 of the Revised Statutes of New York, the main difference being that subdivision 1 of said section 55 merely provides for an express trust 'to sell lands

for the benefit of creditors' (4 N. Y. Rev. Stats., 8th ed., p. 2437); and it was held in New York, both before and after the adoption of our codes, that there could be no express trusts as to land, except those enumerated in said section 55. In *Hawley v. James*, 16 Wend. 148, Judge Bronson says: 'But there can no longer be any express trusts, except such as are enumerated and defined by the statute, and these are all enumerated in the fifty-fifth section.' In *Gilman v. Reddington*, 24 N. Y. 15, the court say: 'Trusts to convey land to a beneficiary are not enumerated in the statutes of uses and trusts'; and in *Hotchkiss v. Elting*, 36 Barb. 44, the court say: 'The trust therein mentioned is simply to convey the premises, subject to the reservation, to such person or persons as the wife of the plaintiff should by writing appoint. This is not one of the trusts authorized by law, and is therefore absolutely void.' The foregoing are merely a few of many other New York cases to the same point: *Townshend v. Frommer*, 125 N. Y. 458, 459, 26 N. E. 805; *Yates v. Yates*, 9 Barb. 340; *Campbell v. Low*, 9 Barb. 590, 591; *Voorhees v. Presbyterian Church*, 17 Barb. 105; *Cooke v. Platt*, 98 N. Y. 37, 38; *Hagerty v. Hagerty*, 9 Hun, 176. The New York statutes contain provisions for 'powers in trust' which are not created by our code, and which will be noticed hereafter.

529 "But counsel for appellants contend that although the trust to convey be held void, still the will, upon various suggested theories, ought to be construed as devising estates in remainder to the persons of the designated classes. In one phase of the arguments, the words 'to transfer and convey' seem to be treated, substantially, as we might treat surplusage in a pleading, or a covenant for further assurance in a deed; but this view is entirely inadmissible, for the words do not precede or follow, and are not merely additional or supplemental to, any other words which, by themselves, and without the aid of the words 'to convey,' would devise any estate whatever to the asserted remaindermen. The case would have been different if there had been an independent devise followed by a direction to the trustees to convey to the devisees; in that case the words of devise would have created an estate, and the conveyance would have been unnecessary, except, perhaps, as convenient and additional evidence of title. It is true, as counsel say, that courts are liberal and indulgent in the construction of wills. This has been so from an early period in the history of the common law, when it was held that, in a will, the word 'heirs' was not necessary to create a fee where there were other words in



the instrument showing an intent to do so, although at that time 'heirs' was absolutely necessary, in a deed, to create a fee, no matter what other language was used. Technical informalities, or grammatical errors, or words which, in legal language, are inapt to express the evident intention of the testator, will be construed as though the proper legal phraseology had been employed; but there must be some language used to effectuate that which a litigant claims to have been the intention of the testator. Counsel speak of the rights of the 'devisees,' and say that no conveyance was necessary, because, 'under the devise,' the 'devisees' took a vested, although defeasible, remainder in fee, and that although the trustees took the whole legal estate, still the direction to convey does not render the 'devise' void; but all this assumes that, apart from the trust to convey, there is, in the will, a devise in remainder, which is not the fact. Of course, the precise, technical word 'devise' is not necessary; any other word or language expressive of the same action or design would be sufficient; but in this will there is no such language. There is no language whatever upon the subject, other than the <sup>530</sup> direction to transfer and convey; and to eliminate these words would be to leave the estate, after the death of all the decedent's children, entirely undisposed of.

"Appellants indulge in frequent invocations of the rule that the intention of the testator must prevail; and they seek here to apply the rule to the point that this will should be construed as if it directly devised estates in remainder to the classes named, so that the persons of those classes living at the death of the testator would take vested remainders, subject to open and let in after-born children of the classes. But the rule includes the propositions that the intention must be found in the will itself; that where the language of the instrument is unambiguous and perfectly clear, there is no field for the play of construction; that where the testator has clearly expressed one intention, the court cannot impute to him another; that the intention which clearly appears must be lawful; and that a court can, in no instance, make for the testator a new will. Now, in the case at bar it is perfectly clear, beyond even a reasonable doubt, that the testator did not intend to devise estates in remainder to persons of the named classes, but intended to devise the whole fee to his trustees, upon trusts to convey, after the expiration of a probably very long period of time, to those persons, so that the latter would receive new estates created by the conveyances. There is no room here for any construction based

upon an apparent or presumed unskillfulness, ignorance, or negligence of the testator; the will is in apt legal phraseology, and his intentions are clearly and accurately expressed. Not only are the words 'to transfer and convey' used without any other language indicating in any way an intent to devise estates to persons of the classes named, but those words are used over and over again—thus showing, *ex industria*, what his fixed purpose was. In order to carry out his scheme he had to provide that his trustees, under certain circumstances, should convey portions of the estate to persons of certain named classes, and that upon the happening of certain events the same portions should be conveyed to other persons of other named classes, so that, to meet these various contingencies, the directions to his trustees had to be frequently repeated; but in no instance did he fail to use the words 'transfer and convey.' Not even by a slip of the pen was he betrayed into using any language that might be construed into a direct devise—as, for instance, that the property should 'go to,' or <sup>531</sup> 'belong to,' or 'vest in' the classes of persons enumerated. Moreover, when we come to the provision for the appointment of a new trustee, if necessary, we find that there he expressly provides that the title to the trust property 'shall vest' in the new trustee without the necessity of any conveyance from the other trustees—thus showing how material, in the mind of the testator, were the former provisions that the trustees should convey.

"The principle that the intention which a testator has clearly expressed in his will must be followed, and that—applying the principle to the case at bar—the will cannot be construed as intending a direct devise where the clearly expressed intention is otherwise, and that there cannot be a devise without operative words sufficient to create it, is aptly illustrated in *Estate of Young*, 123 Cal. 337, 55 Pac. 1011. That case goes even further in applying this principle than it is necessary to go in the case at bar, for there the will showed on its face that the testatrix was unlearned and unskillful as a conveyancer, while here the express design was clearly stated in legal language and persistently adhered to. In the *Young* case the words in the will to be construed were, 'To C. A. Young, my husband, my bank book shall be handed to him with gold watch and chain, also two deeds. After my husband deatt the two deeds shall go to Katarina Muhr'; and it was contended that the will should be construed as devising an estate in the land described in the deeds to the husband for life, and remainder in fee to Katarina Muhr;

but the court held that the express intent was, merely, that the deeds should be delivered, which amounted to nothing, and that there were no operative words in the will which constituted a devise of the land. Mr. Justice Henshaw, in delivering the opinion of the court, said, among other things, as follows: 'There was no delivery of these deeds during the testatrix's lifetime. What validity they possessed then came from the will, and therefore, if, by the act of the testatrix, title to these lands passed, we must find in the will both an intent to devise them and operative words to effect the intent'; and again, 'There must, in the will itself, be found a clear intent to devise them, and operative words sufficient to create a devise'; and then the language of Buller, J., in the case of *Dacre v. Dacre*, 1 Bos. & P. 251, is quoted with approval, as follows: 'I agree that the testator may express his intentions by what words he pleases, and the court is so to <sup>532</sup> expound his expressions that every word may stand, if possible. The court is to pronounce according to the apparent intent of the testator, but that intent must be found in the words of the will, and is not to be collected by conjecture dehors the will, or as my lord chief justice expressed himself in a late case, as the question has not been asked of the testator, it is but conjecture what would have been his answer.' In *Hawley v. James*, 16 Wend. 143, Judge Bronson stated the rule as follows: 'The rule that the intent of the testator is to govern in the construction of wills has no necessary connection with the inquiry whether the devise or bequest is consistent with the rules of law. When we have ascertained what particular disposition the testator intended to make of his estate, then, and not before, the question arises whether the will is valid. If the disposition actually made is not inconsistent with the rules of law, the will is good, and must be carried into effect, whatever the testator may have thought about the legality of the act; and on the other hand, if the disposition actually made is contrary to law, whether it happened through design or the want of accurate information, the will is worthless, and we have no choice but to declare it void.' The case at bar is clearly within these declared principles; for here the intent was clear, that the whole estate was to go to the trustees, to be by them conveyed, and there are no operative words to create an estate in remainder. Of course, if an estate be created subject to several trusts, one of which is void, and the latter is legally separable from the others, the estate vests, unaffected by the void trust; but if



the creation of the estate depends upon the execution of a void trust, then it can never come into existence.

"Counsel for both parties, in discussing the point above noticed, as well as other points in the case, have commented largely on a line of New York cases, of which *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805, *Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455, *Bruner v. Meigs*, 64 N. Y. 506, and *Moore v. Appleby*, 36 Hun, 386, are instances. In the opinions in some of these cases, there is followed, to some extent, the examples of former writers on uses, trusts, powers, and estate, who were wont to indulge very fully in abstruse learning, and to use language of rather an indefinite and ambiguous character, somewhat after <sup>533</sup> the methods of the metaphysicians; but, while there is some apparent inconsistency in these cases, they will all, upon close examination, be found to establish the proposition, that whether there is, in a will, a direct grant of remainders, or a mere trust to convey at a future time, so that no estate is to vest until the execution of the conveyance, is to be determined by the intention of the testator expressed in his will. The case of *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805, is almost exactly like the case at bar, and it is proper to briefly state here the facts of that case and the conclusion of the court. In that case Mrs. Curtis, being the owner of lands subject to a mortgage, conveyed the same to a trustee, in trust, to pay over the yearly income to herself during her life, and upon the further trust that her trustee shall 'convey said lands, and every part of them, in fee simple,' to her children 'living at her decease, and the surviving children of such of them as may then be dead.' The mortgage was afterward foreclosed, but certain children of Mrs. Curtis then living were not joined as parties to the foreclosure suit. The plaintiff claimed under a conveyance from the children, and the defendants under the foreclosure suit, and the question was, whether or not the children who conveyed to plaintiff had estates in the property which made them necessary parties to the foreclosure suit. The court held that the trust to convey, although invalid as one not permitted by the statute, yet, under another provision of the statutes of New York, might be held valid as a power in trust; but that it 'conferred no interest in the estate, during the grantor's life, upon any further class of intended beneficiaries; and so that they were not necessary parties to the foreclosure suit; that the extinguishment of the estate in the grantor and trustee by the foreclosure sale destroyed it as to the beneficiaries

of the power, and therefore plaintiff acquired no interest under his deed.' And so in that case it was held, as we hold in the case at bar, that no estate in the land vested in the persons of the enumerated classes, because that was not the intention of the testator as expressed in the will; and the intention of the testator in the case at bar was much more pronounced and positive than in the case of *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805.

"It is contended by appellants, that even though the trust to convey be void under our statute, yet it should be considered merely as a use, executed by the English statute of uses (27 Henry VIII, c. 10). There is in the briefs a great deal of <sup>534</sup> discussion of the question whether certain old English statutes, including the statute of uses, are parts of the law of this state; but for the purposes of this case we do not deem it necessary to follow that discussion to any great extent, or to definitely determine the question. The only declaration in our law upon the subject is contained in section 4468 of the Political Code, which is as follows: 'The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state.' This declaration includes only the 'common law of England,' and makes no reference whatever to any English statutes, either ancient or modern. Of course, strictly speaking, the very essence of the common law is, that it is not statutory law; it is the *lex non scripta*, as distinguished from the *lex scripta*, which is made by acts of parliament. The original English colonies, which afterward became states of the American Union, were governed, before the American Revolution, by the laws of England, both common and statutory, so far as they were applicable to their conditions; and after the separation, generally by constitutional and statutory declarations, and in a few instances by judicial construction, the acts of parliament which had been passed before certain named periods became the common law of those original states; and in other states which were afterward carved out of the original states, certain old English statutes, generally by express constitutional or statutory declarations, were considered part of the common law of those states. In *Norris v. Harris*, 15 Cal. 253, it was intimated that in American states, erected over territory which was derived from countries other than England, and where neither the common nor the statutory law of England ever formerly prevailed, there is no presumption that the com-

mon law itself exists, except as expressly declared by the constitutions and statutes of such states. It was so expressly held in *Herr v. Johnson*, 11 Colo. 393, 18 Pac. 342, and the current of authority seems to be that way, although in Nevada (*Hamilton v. Kneeland*, 1 Nev. 40; *Ex parte Blanchard*, 9 Nev. 101; *Evans v. Cook*, 11 Nev. 69) it was held otherwise. On this question, see *Matter of Lamphere*, 61 Mich. 108, 27 N. W. 882; *Commonwealth v. Knowlton*, 2 Mass. 534; *Sackett v. Sackett*, 8 Pick. 309; *Bogardus v. Trinity Church*, 4 Paige, 198; *Henry v. Bank of Salina*, 5 Hill, 532; *Levy v. McCartee*, 6 Pet. 110.

535 "In 4 Kent's Commentaries, 299 (an authority frequently cited), it is merely said that 'the English doctrine of uses and trusts, under the statute of 27 Henry VIII, and the conveyances founded thereon, have been very generally introduced into the jurisprudence of this country,' which is, of course, true; but that only means that they have been introduced in quite a large number of the states by the methods and under the circumstances above noticed. The only case in this state to which our attention has been called, in which the question was ever raised, is *Chandler v. Chandler*, 55 Cal. 267, in which it was passed as unnecessary to be decided. We have noticed the question thus briefly, and a few of the authorities bearing on it, because it is an interesting question; and as it is not necessary to pass upon the question definitely here, we do not do so, so as not to embarrass the decisions of future cases, where it might be of great importance. The meaning of the phrase, that the statute of uses 'executes' a use or trust is, simply, in substance, that, under that statute, if A grants or devises lands to B for the use of, or in trust for, C, C immediately takes the legal title as well as the beneficial use, and B takes nothing: 2 Perry on Trusts, par. 298. Now, whatever may be considered as constituting the common law as adopted by section 4468 of the Political Code, still it prevails only 'so far as it is not repugnant to or inconsistent with . . . the constitution or laws of this state'; and section 4 of the same code provides as follows: 'The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates.' Title 4 of part 2 of the Civil Code 'establishes the law of this state respecting' uses and trusts, and there is no provision in it similar to that of the English statute of uses, which vests the legal title in the cestui que trust. There was at one time what was then section 848 included in said title 4, which reads as



follows: 'Every person who, by virtue of any transfer or devise, is entitled to the actual possession of real property, and the receipts of the rents and profits thereof, is to be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as is the beneficial interest'; but that section was expressly repealed on March 20, 1874, as well as the sections following it, which were designated as 849, 850, and 851, and referred to the same subject. <sup>536</sup> Moreover, section 863 in the said title is as follows: 'Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.' It is clear, therefore, that, under our statute of uses, no legal estate vests in the beneficiary. Indeed, the English statute of uses is repugnant to our whole system of conveyances, which is simply in form, and inconsistent with the purposes of our system of registry: *Gorham v. Daniels*, 23 Vt. 609. Moreover, the judicial decisions in this state have not, to our knowledge, applied here the English statutes of uses—at least, we have not been referred to any decisions here which have done so; on the contrary, the decisions here have always gone upon the theory that the only remedy of the holder of a use or an equitable right in the trust was a decree in equity for a conveyance: *Estrada v. Murphy*, 19 Cal. 249; *Emeric v. Penniman*, 26 Cal. 119; *O'Connell v. Dougherty*, 32 Cal. 458; *Greer v. Blanchar*, 40 Cal. 197.

"In *Greer v. Blanchar*, 40 Cal. 197, the court say: 'The property in controversy is alleged to have been conveyed in the year 1853, to a trustee, "in trust, for the use and benefit of Harriet M. Risley and S. Risley."' By means of that conveyance the equitable estate in the premises was vested in the Risleys as joint tenants'; and this is merely a declaration of the principle which runs through all our decisions: that in such a case the equitable estate, only, vests in the beneficiary; while under the English statute of uses, in such a case, the legal title would have so vested. Again, the statute of uses executed only those trusts which were passive—that is, where there was nothing for the trustee to do, as where there was a conveyance to him, in terms, for the use of another, or where he stood seised to the use of another, or where he was to permit or suffer something—but it did not execute a special or active trust where there was some duty to be performed by the trustee; and a

trust to convey was an active trust, and therefore not executed. In 1 Perry on Trusts, section 309, the principle is correctly stated as follows: 'Therefore, if any agency, duty, or power be imposed on the trustee, as by a limitation to a trustee and his heirs to pay the rents, or to convey the estate, . . . in all these cases, and in other like cases, the operation of the statute is <sup>537</sup> excluded, and the trusts or uses remain mere equitable estates.' In 1 Lewin on Trusts, 210, the rule is also laid down as follows: 'Special trusts are not within the purview of the act of Henry VIII; and, therefore, if any agency be imposed on a trustee, as by limitation to A and his heirs, upon trust to pay rents or to convey the estate, . . . in all these cases, as the trust is of a special character, the operation of the statute of uses is effectually excluded.' Moreover, under the English statute of uses only a valid use or trust could be executed; and, as we have seen, in this state a trust to convey is invalid. Therefore, under any view of the law, the trust in the case at bar was not executed.

'The contention, that although the trust to convey be void, it may be held good as a 'power in trust to convey,' cannot be maintained. The New York statutes, which are very similar to ours, in enumerating those trusts as to real property which alone are valid, expressly provide for a power in trust to convey; but there is no such provision in our statutes, although we had such a one for a short time. It was section 860, in the same title 4 of the Civil Code, which declares what trusts are and what are not valid, and was as follows: 'Where an express provision as to real property is created for any purpose not enumerated in the preceding section, such trust vests no estate in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust, subject to the provisions in relation to such powers contained in title 5 of this part.' It was followed by two other sections on the subject, but they were all three repealed in 1874, and in the same year the entire title 5, which was on the subject of 'powers' and which contained over sixty sections on that subject, and to which said section 860 above quoted refers, was also wholly repealed. With respect to the meaning and operation of title 4, which declares what trusts in relation to real property may and what may not be created, there is no distinction between a trust to convey and a power in trust to convey. A mere naked power can be exercised or not, at the will of the holder; but if the

exercise of it be imperative, it is a trust. In Sugden on Powers, the author, having said that it is the very nature of a power to be 'left to the free will and election of the party to execute it or not, for which reason equity will not say he shall execute it,' proceeds as follows: 'But in laying down this broad rule <sup>538</sup> we must be careful to distinguish between mere powers and powers in the nature of trusts. The distinction between a power and a trust is marked and obvious. "Powers," as Lord Chief Justice Wilmot has said, "are never imperative." They leave acts to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted. But sometimes trusts and powers are blended; a man may be intrusted with a trust to be effective by the execution of a power given to him, which is in that case imperative; and if he refuses to execute it, or die without having executed it, equity, on the general rule that the trust is in the land, will carry the trust into execution': 2 Sugden on Powers, 158. Upon the same subject in Perry on Trusts, the author, having said that 'mere powers are purely discretionary with the donee,' says as follows: 'It is different with powers coupled with a trust,\* or powers which imply a trust. . . . There are mere powers and mere trusts. There are also powers which the party to whom they are given is intrusted with and required to execute. Courts consider this last kind of power to partake so much of the character of a trust to be executed, that they will not allow it to fail by the failure of the donee to execute it, but will execute it in the place of the donee. Lord Hardwicke observed that such powers ought rather to be called trusts than powers. In all cases, these powers or trusts must be construed according to the intention of the parties, to be gathered from the whole instrument': 1 Perry on Trusts, par. 248. It is clear, therefore, that a 'power in trust to convey' is a trust to convey, within the meaning of said article 4, and that, not being within any category of valid trusts within this article, it is by said article forbidden. Under this view we do not think it necessary to notice any of the other views taken of this subject by either respondents or appellants.

"A good deal has been said by counsel about the difference—or, as appellants contend, the want of much difference—between the consequences flowing from a direct devise, and those flowing from a trust to convey at a distant period to persons of certain classes who might then be in existence.



The quantity of that difference is not material to the determination of the question here involved. The question to be determined is, What did the testator do? Did he devise vested estates in remainder, or did he devise the whole fee to <sup>539</sup> the trustees upon trusts to convey after the death of all of his children? If, however, it were important to consider the consequences, it is quite plain that those flowing from one of those acts are very different from those which would flow from the other. If, in the case at bar, the testator had made a direct devise in remainder to the persons of the classes named in the will, those of the latter who were alive at the testator's death would have immediately taken vested estates; the interest of each would have been a property and ownership in the land, with all the rights, powers, and advantages which legally belong to such an interest. If there had been a direct devise to the trustees for the lives of the testator's children, with remainders to the said classes, as there would have been persons in esse of said classes to take were the life estate to end at the present time, such persons would have taken vested remainders; and 'such a remainder confers a present fixed right to the future enjoyment, which rises to the dignity of an estate in the land, and invests the remainderman with a portion of the seisin, property, or ownership': 20 Am. Eng. Ency. of Law, 839, 840, and cases cited. 'Such a remainder may be devised, assigned, and limited over': 20 Am. & Eng. Ency. of Law, notes to p. 840, and cases cited. Such a remainderman has a status which gives him many rights and remedies; he is a necessary party to suits to foreclose, for partition, etc., and may himself maintain suits about the land, as to recover damages for waste, etc. It is needless to pursue further the incidents of such an estate; but the trust to convey contained in the will vests no estate whatever in the persons of the classes named; they have no 'portion of the seisin, property, or ownership.' It merely gives to persons of certain named classes, who may happen to be alive at a remote, uncertain time (none of whom need be in existence at the present time), a contingent right to compel the execution of the trust to convey. They are simply in the category of those mentioned in section 863 of the Civil Code, where it declares that 'the beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.'

"There are other considerations presented by counsel of both sides, bearing upon the question of the validity or inva-

lidity of the trust clause of the will here under discussion, but they are of less consequence than those heretofore noticed, and are mostly covered by the views already expressed; and owing <sup>540</sup> to the great length to which this opinion has already gone, they must be passed without special notice. It may be remarked, generally, that while a man's power to say to whom his land shall go when he dies is a proper and valuable property right, still there is no rule of law or public policy which calls upon a court to be diligent to discover some way to make good a man's forbidden scheme to determine who shall have his property fifty years after his death. It is true that our code permits a suspension of the power of alienation during lives in being, and that where, as in the case at bar, the lives selected are those of very young persons, suspension may be, in the natural course of events, for half a century; but where the attempt to do this has not been lawfully accomplished, there is no reason why a court should condone the unlawfulness of the attempt, for the general policy of the law is against the tying up of property and keeping it for long periods out of the current of alienation and apart from ordinary business purposes. And then the rights of the legal heirs, to whom the law gives property in case of intestacy, are entitled to some consideration. In *Estate of Walkerly*, 108 Cal. 656, 49 Am. St. Rep. 97, and note, 41 Pac. 772, this court said: "The intestacy of the testator as to the Walkerly Block is the harsh result which must follow this void trust, and the property will descend to his heirs. It is true that such was not the testator's intent, but the testator must do more than merely evince an intention to disinherit before the heirs' right of succession can be cut off. He must make a valid disposition of his property: *Habergham v. Vincent*, 2 Ves. Jr. 204; *Hawley v. James*, 16 Wend. 150; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938." Our conclusion as to the trusts to convey, sought to be created by the fifteenth clause of the will of the decedent, is the same as that reached by the learned judge of the court below—namely, that they are void.

"We also agree with the learned judge of the court below that the invalid trust to convey carries with it the otherwise valid trust for the lives of the testator's children, and that therefore the whole trust failed. Of course, the general rule is well settled, that where there are valid and invalid clauses in a will, the question whether the valid clauses can stand depends upon whether or not the invalid ones are so inter-

woven with them that they cannot be eliminated without <sup>541</sup> interfering with and changing the main scheme of the testator. In *Darling v. Rogers*, 22 Wend. 495, Senator Verplanck correctly stated the rule as follows: 'When a will is good in part and bad in part, the part otherwise valid is void if it works such a distribution of the estate as, from the whole testament taken together, was evidently never the design of the testator. Otherwise when a good part is so far independent that it would have stood had the testator been aware of the invalidity of the rest.' And in the celebrated *Tilden* will case (*Tilden v. Green*, 130 N. Y. 50, 27 Am. St. Rep. 487, and note, 28 N. E. 880), the court say: 'The appellants invoke the aid of the principle, that where several trusts are created by will, which are independent of each other, and each complete in itself, some of which are lawful and others unlawful, and which may be separated from each other, the illegal trust may be cut off and the legal one permitted to stand. This rule is of frequent application in the construction of wills, but it can only be applied in aid and assistance of the manifest intent of the testator, and never where it would lead to a result contrary to the purposes of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property.' In the case at bar, it is quite clear from the will that the trust as to the income during the lives of the testator's children, and the trust to convey the corpus of the property after their death to certain enumerated classes of persons, were inseparable parts of one entire scheme; and there is no reasonable ground for the supposition that if he had known that the latter trust was void, he would have allowed the former to stand. Upon such a supposition we would have to hold that he would have been willing to merely devise an estate to the trustees during the lives of his children, the income to be divided equally between them, and allow the entire reversion undisposed of by him to go to the heirs at law. But, clearly, that was not his intention. His manifest purpose was, that none of his property should go either to his children, or to any other persons as heirs at law. He intended, through the devise to the trustees and anticipated conveyance by them—for, of course, he must be deemed to have been ignorant of the illegality of the trust to convey, and to have supposed that it would be performed—to dispose of the temporary income to his children during their lives, and ultimately <sup>542</sup> the entire corpus of the property, leaving no part of the fee undisposed of; and his division of the income was evidently



based upon the consideration of the persons who would or would not ultimately get the corpus of the property. But the mere creation of an estate in the trustees for the lives of the children, for the benefit of the latter as beneficiaries of the income, leaving the reversion to go to the heirs at law, would have been inconsistent with the most determined purpose of the testator. In such event the three children, being themselves the heirs at law, and having also the income during their lives, and there being no remaindermen to complain of or interfere with any of their acts in the premises, the title would be in a somewhat anomalous condition. It is not necessary to inquire what power of alienation of the fee the children would have under such circumstances if the trustees insisted upon holding on under the income trust, or whether the children, having both the inheritance and, substantially, the beneficial use, could compel a termination of the trust. They could certainly, with the consent of the trustees, have the trust discharged (Civ. Code, sec. 2282); in which event they would have the entire estate in fee simple, with present possession of the property. Of course, if the trust to convey were valid, there would be a duty upon the trustees to hold the title and possession until the death of all the children, and then convey it to persons of the named classes; but the trust to convey being void, why should the trustees be required to hold against the present owners of the entire property? And who else would there be with a legal right to complain of the termination of the trust? And thus the children would have, what the testator expressly declared in his will they should not have, present vested estates in fee in the whole property. Moreover, the testator expressly and emphatically declared that no child of his son Charles should have any part of his property, and that Charles himself should have nothing except one-third of the income during his life; but, under the construction contended for by appellants, Charles would, under one view, have one-third of the corpus of the property, and might, upon the happening of certain events, have it all, and, under another view, his children would take, contrary to the will of the testator; and as the income given to Charles would be very large, it may well be supposed that it was given him so that he might be spurred to save <sup>543</sup> something for his children, and that the testator would not have given him so much if he had known that his children might inherit. For these reasons, as well as for others that

could easily be suggested, we hold that the invalidity of the trust to convey destroys the whole scheme of the will, and carries with it the trust for the lives of the children."

The foregoing opinion disposes of what may be termed the technical legal phases of the case, and we pass to the consideration of questions which largely have presented themselves upon the last arguments, and which were called forth by reason of the views of the various justices of this court promulgated in the former decision.

The will provides: "All the rest, residue, and remainder of my estate, property, and effects, real, personal, and mixed, whatsoever, and wheresoever situated, I give, devise, and bequeath unto my trustees hereinafter named, and to the survivors of them, and to their successors in office, in trust, for the following uses and purposes; that is to say, to have and to hold the same, in trust, during the lives of my daughters, Theresa A. Oelrichs and Virginia Fair, and my son, Charles L. Fair, and during the life of the survivor of them, and upon the death of said survivor to transfer and convey to the children or descendants of my said daughter Theresa A. Oelrichs, the one-fourth of said trust property and estate," etc. We are now directly confronted with a question of construction; namely, Does this provision of the will place in the trustees a trust to transfer and convey this estate to certain of Fair's kindred? or, upon the contrary, may it be construed as a direct devise to those kindred? Simplifying the proposition, yet leaving it exactly the same in principle, aside from the question of perpetuities, let us assume the provision to be, "All the rest and residue of my estate and property I give, devise, and bequeath unto my trustees, in trust, for the following uses and purposes; that is to say, to have and to hold, in trust, for six months, applying the rents and profits thereof to the care of my children, and upon the expiration of the six months to transfer and convey said property and estate to my kindred" (naming them). Does such a provision create a trust in the trustees to transfer and convey the estate? Thus presented, this question does not seem to be a big one. Yet a wonderful amount of argument, of learning, and of law by most eminent counsel has been advanced to aid the court in <sup>544</sup> giving the true answer. In construing this language of the will, it must be kept in mind that the court is not allowed to force the construction of a sentence, or even a word, in order that a particular result may be reached; and this is the rule,

even though such construction be absolutely necessary to save the document from complete condemnation.

In the Walkerly case, *supra*, it is said: "Where the language of the provisions of the will is plain and unambiguous, the courts are not permitted to wrest it from its natural import in order to save it from condemnation. . . . It may be said of all wills, that the testator's intent is to make a valid disposition of his property. . . . But a court is not therefore authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court had he known his own attempt was invalid." Now, this property, under the illustration, was devised to the trustees, in trust, for certain uses and purposes. What are these uses and purposes? They are: 1. To hold the property for six months, and apply the income to the care of the children; 2. At the period of the time fixed, to transfer and convey the property to certain kindred. It is conceded that the trustees took the property in trust for certain uses and purposes; yet the trust to transfer and convey appears as plain and palpable, from the language used, as the trust to hold the property for six months, and apply the income to the care of the children. If there be a trust created to do one of these things, there is a trust created to do the other. The testator's intentions must be determined from the words he used. He said he desired the trustees to hold the property in trust for a fixed period, and then transfer and convey it. He certainly intended by these words that they should make a deed of conveyance of the property. And if he intended that they should make a deed of the property, he only could have intended that they should by that deed pass the fee of the property. The words used, indicating a conveyance, are words of simple, ordinary legal import, and are the words always used in an instrument where a party desires property to pass by deed. A layman would not hesitate a moment in the declaration that Fair intended by this language that the trustees should pass title to the property by deed. It is only the astute lawyer who can see any other intention. While Fair's intention as to the creation of a trust  
545 in the trustees to convey stands out so that all may see, we find nothing in the instrument, anywhere, showing a contrary intention. Indeed, when the pleadings in this case were prepared, and filed by the trustees, we find a verified allegation in



those pleadings to the effect that these trustees were the owners in fee simple absolute of this property, in trust, etc.

Stress is laid by appellants upon the effect of the words, "to have and to hold, in trust, during the lives of," as fixing the estate of the trustees; yet it is plain, the simple purpose and effect of that clause is only to fix the time when the trustees shall make the conveyance—shall transfer and convey the estate. These words were not used to fix the quantum of the estate of the trustees, but to fix the day when the fee should be conveyed to the beneficiaries. If the estate were devised to the trustees, in trust, to have and to hold for six months, and then to transfer and convey to the beneficiaries, would the estate in the trustees be an estate simply for years? We hold not; but, on the contrary, are assured the words, "to have and to hold, in trust, for six months," would be used for the purpose, and should have the effect alone, of marking the time when the property should be transferred and conveyed; and would in no degree establish the quantum of estate devised by the instrument to the trustees in trust. These words not having any effect upon the quantum of the estate, there are no other words in the instrument having any tendency to diminish that quantum. It seems, under these circumstances, that if a complete and perfect fee ever could vest in a person, it has vested in these trustees. It follows from these views that the contention of appellants, to the effect that the trustees took only an estate for the lives of Fair's children, or an estate for life with an incidental fee which allowed them to sell and transfer the property during that period, cannot be maintained.

Another view of this contention, closely allied to the one just considered, is found in the claim that the will creates an estate for life in the trustees, with a direct devise to Fair's kindred. And this claim is based upon the concession (for the purposes of the case, only) that Fair intended to create a trust to convey, but the means or mode provided by him for vesting the estate being illegal, therefore, in order to carry out his general intent to vest the property in certain of his kindred, a legal means and mode will be substituted by the court. In other words, <sup>546</sup> the contention is, that, notwithstanding Fair's intention to create a trust to transfer and convey his property may appear upon the face of the will as plain as a blazing fire in the darkness of night; notwithstanding Fair may have said in his will, "I hereby intend in and by this will to create a trust in the trustees to transfer and convey my property to my benefi-

aries"—notwithstanding all this, the court will give no concern to that expressed intention, the trust being void; but in order that these particular beneficiaries may secure the property, will hold that it passes to them by direct devise. Courts will look askance at such a proposition, for it is startling in the extreme. In the first place, we do not find any general or ultimate intent upon the face of the document indicating that these beneficiaries shall take this property by hook or by crook. The only intent we find is an intent that they shall take it in a certain specified way; namely, by way of a trust to transfer and convey. Can counsel or court say that, from the face of this instrument, there is a plain intent that these beneficiaries shall have this property, regardless of the way provided by the testator for them to take it—indeed, regardless of everything? Upon the contrary, it seems that they were to get it only by way of the route pointed out in the will. If that route be blotted out, how may they get it at all? Who can say from the words of the will but that the testator intended that they should get it by way of the trust, or not get it at all? This court is not wise enough to say that Fair did not know he was creating a trust to transfer and convey when he made his will. In *Estate of Young*, 123 Cal. 343, 55 Pac. 1011, it is said: "One of these rules firmly established and never departed from, nor even criticised, is, that the expressed intent will not be varied under the guise of correction because the testator misapprehended its legal effect. The testator is presumed to know the law. If the legal effect of his expressed intent is intestacy, it will be presumed that he designed that result. The inquiry will not go to the secret workings of the mind of the testator. It is not, What did he mean? but it is, What do his words mean?"

Let it be conceded that a general intent may be found in this will, indicating that these beneficiaries should have the property, still the only mode provided by the testator for them to get it is illegal, prohibited by the law, and this court has no power to provide a legal mode. In attempting to vest an estate, if the only mode prescribed for the purpose by the testator <sup>547</sup> is illegal, courts cannot close their eyes to that mode and substitute in lieu thereof a legal mode. A valid power in trust, coupled with a statute of uses, might do it; but without the power and the use, it cannot be done. If the mode provided by the testator was legal, but defective in substantial, the court could not create a new mode. Then, when the mode created is illegal, void, amounts to nothing, how may the court

create a new and legal mode? The law says to Senator Fair: "You shall not create a trust to convey your property." Fair says: "I will create a trust to convey my property." The court says: "The trust you created to convey your property is void, because prohibited by law; but your wishes as to the disposition of your property will be carried out, through the medium of a direct devise, exactly the same as though the trust you created was entirely valid; and the words you used to create the void trust will be held to create a valid direct devise." This construction of the instrument renders the law forbidding trusts of this character absolutely nugatory, and demands the exercise of an accommodating spirit upon the part of the court, which the law forbids. Under the law of this state, a devise to A in fee, in trust, to convey to B, cannot be the equivalent, by any possible rules of construction, of a direct devise to B. That is the substance of this contention; but to so declare would shock the statute forbidding the creation of trusts of the character here involved. In this illustration, with equal propriety it may be said that there is a general intent that B should have the property; yet, by no judicial construction could he ever get it. It is not the right of the court, by construction, or in any other way, to evade a rule of law in order that some particular result may be reached. The court may only declare the law as it finds it, whatever the result of that declaration may be.

Some importance is attached by appellants to section 864 of the Civil Code. That section provides: "Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong in the event of the failure or termination of the trust, and may transfer or devise such property subject to the execution of the trust." The facts of this case do not call for an analysis in detail of this section of the code. In the creation of the trust here involved, the trustor has made no attempt to prescribe to whom the property shall <sup>548</sup> belong in the event of the failure or termination of the trust. He has not said, as he may have said under this section, "If the trust I have hereby created in the trustees to transfer and convey my property is not a valid trust, and for that reason shall fail, then I direct that this property shall pass," etc. A provision of that character in this will would bring the case directly within the section. But the testator wholly fails to insert the provision. He makes no attempt to do it. Again, the section cannot be construed to mean that, the trust provided for by



the instrument being void, the language creating it will be treated and deemed the prescription mentioned in the section, and therefore the property will pass exactly as it would have done if the trust had been valid. Certainly, this construction of the section was never contemplated by the law-makers, for it would be holding that every void trust to convey could be transformed into a valid prescription.

If you eliminate the words "transfer and convey" from the will, then the beneficiaries named would not take the estate at all, for the heirs of Fair would be entitled to inherit it. Hence the interests of the beneficiaries in the estate can only come to them through the words "transfer and convey"; and if the beneficiaries are to take the fee, and take it only through the medium of those words, the trustees must have the fee vested in them, in order that they may transfer and convey it. The will demands that they shall transfer and convey to the beneficiaries—that is, make a conveyance of the property to them,—that is, vest the title of the property in them by a conveyance. To hold otherwise, to give the words "transfer and convey" some other meaning, is to wrest them from their usual and ordinary import, and give them a forced meaning wholly unjustified by anything contained in the instrument. The favor of the law in the direction of supporting testacy cannot go to these lengths. If the document under consideration had been a deed, and not a will, would this court hold that these named kindred would take the estate by direct grant, the trust being void? We apprehend not. Yet the intent in both cases being the same, the rules of law as to the construction of deeds and wills stand the same. We cannot imagine that an estate created by will would be valid, while the same estate created by deed would be invalid. The rights of devisees are no more sacred, and are entitled to no more protection, than are the rights of heirs.

549 The trustees had the power under Fair's will to convey away the fee of this property. This power was granted to them in express words. However, it is said by appellants that this fee was of a limited character, a fee simply feeding that portion of the trust which authorized the trustees to sell. In another form the contention may be stated to be, that the trustees had the fee vested in them, if they decided to sell the property, but had no fee vested in them if they decided to hold the property. It may well be said that such a fee is of a non-descript character. The fact, standing alone, that the trustees

were authorized to sell the property and convey a fee, points directly and unerringly to the fact that the fee was cast in them. For, if they had no fee, they could convey no fee. And this power vested in the trustees to convey the fee points with equal certainty to the fact that when the testator said, "I devise my estate to my trustees, in trust, to hold for the lives of my children, vesting in the trustees the power to convey the fee during that period of time, and if they do not convey during that period, then they shall transfer and convey my property to certain of my kindred," he meant, and could only mean, by every rule of construction, that the trustees were vested with the fee of his property, which fee they could convey to third parties during the lives of his children; and if not so conveyed, then they should convey it to these kindred.

The court concludes that the fee to Fair's property was cast in the trustees, in trust, to transfer and convey to certain of his kindred; that his intention to so place the fee stands out plainly from the face of the entire will; that no contrary intention whatever appears therefrom; and that the will must fall by reason of this prohibited trust. We are more satisfied with this result, when it is considered that a contrary conclusion would perpetuate a trust of this vast estate, probably for a period of fifty years or more, and also result in a disinheritance of Fair's children. Notwithstanding a man has a right, under the law, to make a will, still the law is not kindly disposed to either of these things, and if this were a closely balanced case, these threatened results would furnish reasons for a decision the other way.

For the foregoing reasons the decree is affirmed.

Van Dyke, J., and McFarland, J., concurred.

550 HENSHAW J., concurring. Upon the former hearing of this case I gave my assent to the conclusion reached by Mr. Justice Harrison, that an equitable remainder in the estate of Fair was devised to the persons to whom the trustees were directed to convey upon the death of his last surviving child. That the will created a trust to convey, I never entertained any doubt. Not only is the language apt and well chosen for that purpose, not only have its phrases been selected and employed with sedulous care, not only was it the opinion of the astute attorneys who prepared the pleadings of appellants that a fee was devised by the will to the trustees, but, in addition to all this, the question propounded upon the last argument of

the case has remained without satisfactory answer, and is to my mind unanswerable: "If this language does not create a trust to convey, what different words would you or could you employ to create such a trust?" In the light of the arguments, oral and printed, upon the last hearing, and after a more detailed and exhaustive consideration of the authorities, I am convinced that in a natural desire to uphold the last will of the deceased, due weight was not given to the clear and explicit intent of the testator. While always of the opinion that a trust to convey was clearly meant and created in the will, and that such a trust, under the laws of this state, is absolutely void, it then seemed to me that the provisions of the will could be sustained in accordance with the doctrine of the cases holding that under such a trust an equitable interest or estate or remainder passes to the beneficiaries. The error of this position came from a failure to give due recognition to the fact emphasized and demonstrated upon the last argument, that only in those courts where a trust to convey is valid, as in England, or in those like New York, where its purpose is effectuated by an enabling statute, as a power in trust, has this rule or doctrine ever been declared. It is because the trust is valid, and that consequently a legal estate vests in the trustees, that an equitable interest or estate, *eo instanti*, following the legal, vests in or passes to the beneficiaries. But where, as in this state, the trust is void, and where, consequently, no legal estate can ever vest in the trustees, there can be no estate in law to support the equity. The whole trust is void. The legislature has prohibited a trust to convey. It has declared such a trust to be void. It has forbidden the separation of the equitable from the legal interest by this mode, <sup>551</sup> and a court can no more say that the equitable estate, under such a void trust, passes to the beneficiaries, than it can say that the legal estate passes to the trustees. Such, I think, is the unanswerable argument in every jurisdiction where, as with us, a trust to convey is prohibited and declared void by express law. For if it can be said that equitable estates may vest in the beneficiaries notwithstanding they owe their existence to trusts prohibited by law, and void, it can only mean that the legislative inhibition against certain trusts is made utterly vain and nugatory. If the trust violates the rule against restraints on alienation, for example, as in *Estate of Walkerly*, 108 Cal. 656, 49 Am. St. Rep. 97, and note, 41 Pac. 772, the solution then would be, not, as there declared, that, the trust being void, all estates, legal and



equitable, attempted to be created were likewise void, but, rather, that, notwithstanding the trust is void, it is plain what the testator intended, and it will be held that equitable estates passed to the beneficiaries, by reason of which they will be permitted to draw to themselves the legal title. Such, of course, cannot be the law.

To uphold the terms of the will, as creating a power in trust, presents equally formidable obstacles. First, because the testator's plain and obvious intent, it seems to me, was to create, not a power, but an explicit trust; but if that point be waived, still the power is a power in trust, and it either must be held that the repeal of powers in trust by the legislature of this state abolished any such power if it did exist, or else that, notwithstanding the declaration of section 847 of the Civil Code, uses and trusts in relation to real property are those only which are specified in this title; that powers in trust, as known to the common law, with all their labyrinthal difficulties and sinuosities, are in full force and effect with us; and that while the legislature has at great pains simplified trusts and estates, it has designedly and intentionally perpetuated the most intricate and difficult subject of common law and equity cognizance, and, through powers in trust, has preserved all the difficulties which it attempted to eliminate in dealing with trusts.

It is unquestionable that it was because powers at common law were abstruse and full of uncertainty that the New York codifiers recommended the abolition of all not expressly declared <sup>552</sup> and reserved: *Jennings v. Conboy*, 73 N. Y. 233. The design was to simplify the cumbersome system which had grown up at common law. Our own code commission followed the example of New York, and adopted bodily their proposed scheme. As part of this scheme were the following sections:

"Where an express trust in relation to real property is created for any purpose not enumerated in the preceding sections, such trust vests no estate in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust, subject to the provisions in relation to such powers contained in title 5 of this part": Civ. Code, sec. 860.

"Nothing in this title prevents the creation of a power in trust for any of the purposes for which an express trust may be created": Civ. Code, sec. 861.

"In every case where a trust is valid as a power in trust, the real property to which the trust relates remains in, or passes

by succession to, the persons otherwise entitled, subject to the execution of the trust as a power in trust": Civ. Code, sec. 862.

They were properly placed under the chapter on uses and trusts, which begins with the declaration that "uses and trusts in relation to real property are those only which are specified in this chapter." For powers in trust are trusts. As Sugden says, "Powers, as we have seen, are mere declarations of trust" (Sugden on Powers, 119); and Lord Hardwicke declared that "such powers [where any person other than the holder has an interest in its execution] ought rather to be called trusts than powers": 1 Perry on Trusts, sec. 248. These sections were repealed with other sections, and, recommending their appeal, our learned codifiers reported to the legislature as follows: "We have proposed to strike out the whole chapter on powers, as wholly unsuited both to the wants and habits of the people, retaining one or two sections by amendment of other portions of the code in places where the provisions of those sections properly belong."

What, then, was the effect of these repeals? Can it be said that they meant the revivification of the abstruse common-law system? Can it be fairly argued that that incomprehensible scheme was better suited to the wants and habits of our people than the simpler one taken from New York, and by us afterward abolished? And if this was in the mind of the revisers<sup>553</sup> and legislature, and if in their contemplation the common-law system was revived by these repeals, why, in expunging those sections, were they so careful to preserve, and to report their preservation of, certain other necessary powers? The reenactment of these carefully preserved powers was unnecessary, because they were existent common-law powers. Can any other conclusion logically be reached than that the repeal meant, not the restoration of common-law powers, but a further simplification and advance over even the New York system, by the abolition of many of the powers which that state had preserved, and the perpetuation of only such as were considered suitable to the simpler wants and habits of the people of this state.

But if it be conceded that common-law powers in trust do exist in this state, still another difficulty confronts us. In England there would not be, and never has been, any occasion to resort to a power in trust to save a will like this, for the trust to convey would be valid and operative as a legal, active trust. The English courts uniformly and unhesitatingly have upheld such wills as creating valid trusts. What those courts

might do if their law declared such trusts illegal, whether they would convert the trust into a power in trust, and thus uphold it, is a question that, as it has never been asked of them, it would be mere speculation to declare what their answer might be. As the necessity never arose at common law for declaring that such language created a power in trust, there is no common-law decision to act as guide. And this was appreciated in New York, where such trusts, as here, are admittedly void, and are saved only by force of their enabling statute, a statute which we have not, and which effectuates the void trust under an express grant of power.

That the void trust may still be treated as valid to the extent that the testator must be held to have prescribed the persons or class to whom the property shall go upon the failure or termination of the trust (Civ. Code, sec. 864), is to my mind also an untenable proposition. There is never, or seldom, any difficulty in determining to whom or in whom the testator or settlor means that his trust property shall descend or vest upon the termination of the trust; but it does not follow from this that, because in indicating this intent he has prescribed an unlawful means for its accomplishment, the result will be assured without regard to the mode. In the case of trusts that violate the rule of restraints on alienation, there is <sup>554</sup> never any doubt to whom the testator meant that the remainder or reversion should go; but in such cases no court has ever selected the designated beneficiaries, and declared that, notwithstanding the fact that their sole claim to title is through a void trust, nevertheless the testator has sufficiently indicated that upon the failure of the trust the trust property is to go to them, and the trust having failed, they shall take at once. There was no difficulty in the case of *Estate of Walkerly*, 108 Cal. 656, 49 Am. St. Rep. 97, 41 Pac. 772, in determining to whom the testator meant that the land should go, but the thought was never entertained that after failure of the trust these persons should still be regarded, within the testator's intent as prescribed and designated by him, to take in the event of the failure of the trust. There, as here, they were to take in conformity with the terms of the trust, or they could not take at all. So that if it be considered in this case that there was an attempt to prescribe the class, it was an attempt either by a void trust or an unauthorized power in trust, and if the mode be invalid, the heirs may not be disturbed in their rights. In *Estate of Walkerly*, 108 Cal. 656, 49 Am. St. Rep. 97, 41



Pac. 772, it said: "A testator must do more than merely evince an intention to disinherit, before the heir's right of succession can be cut off. He must make a valid disposition of his property." We cannot in this case, more than in any other, substitute a valid method for the invalid one so plainly designated.

For reasons amplified in the preceding opinions, it seems apparent that the failure of the trust to convey defeats the testator's trust scheme. It leaves the whole beneficial interest and the whole reversion in his children living at the time of his death—a result essentially and radically at variance with that which he sought to accomplish. The consequence, then, in these particulars, is the same as though he had died intestate. The property will descend to his heirs at law, as provided by the rules of succession in this state, so that those who are the immediate and direct offspring of his blood will succeed by inheritance.

For these reasons I concur in the judgment.

**MR. JUSTICE TEMPLE DISSENTED**, and said, in part, that, being "convinced that powers have not been prohibited in this state, but that the right to create them is unlimited, I am not able to read the will as my associates do. . . . I think, then, since a trust to convey cannot be created in this state, and a power in trust for that purpose is perfectly valid, that the obvious intent of the testator, as shown by the clear language of the will, was to convey to his trustees a life estate only, and that the direction to his trustees, 'upon the death of such survivor to transfer and convey,' was intended as a power in trust. The language is certainly as appropriate and apt for the creation of a power as for a direction to execute a trust. If the eminent counsel for respondents could believe that powers can be created under our laws, I cannot doubt that they would have so construed it. This proposition once admitted, in my opinion the language of the will cannot be understood in any other way.

"The will having been probated, all presumptions are in favor of testacy, and against intestacy. The presumptions in favor of the heirs then cease. The duty of the courts, then, is to so construe the will, if in reason it can be, so as to prevent intestacy, total or partial. Keeping in view, therefore, these propositions, to wit, that the testator knew that a trust to convey cannot be created in this state, and that a power in trust can be, and also that an estate in trust cannot be created for a period unmeasured by lives in being, let us read the will. It is, in effect: 'I give my estate to trustees, in trust, for the following uses and purposes; that is to say, to have and to hold the same, in trust, during the

lives of my children and of the survivor of them, and upon the death of such survivor to transfer and convey,' etc. 'In trust, further, during the lives of my children and of the survivor, to manage and control the said trust property and estate.'

"Here it is expressly declared that the purpose of the trust is, that his trustees shall hold the estate during the mentioned lives, and during such lives, and only for that period, the trustees are expressly authorized to manage and control, to collect rents, etc. There are no further duties as trustees, and no further authority, save to transfer and convey at the termination of the trust. This authority has all the attributes of a power, although it might also have been appropriate as a direction to trustees, had not such trusts been prohibited. Being equally appropriate for both, if one course is unlawful and the other lawful, we must presume the testator meant to do only that which he could lawfully do. Nor do I see how the express declaration that the trustees shall hold during the lives of his children can be regarded otherwise than as also containing the condition that they shall not hold beyond that time, and this is rendered more plausible by the fact that such limitation was required to make the trust legal. The power was to be executed eo instanti upon the death of the survivor. If not then executed, the persons and the interests to be conveyed were ascertained. At that instant, if not before, the entire estate became alienable. I understand respondent to contend that the direction to hold during the lives of the children of the testator is a mode of indicating when the conveyances are to be made. But it seems to me that the only purpose of the trust was to deprive his children of all power to control, manage, or dispose of his estate, while enjoying the profits thereof, and to deprive the children of his son of all interest in it. All this was accomplished by the life trust. The direction to convey was adopted as a mode of ending the trust; so the estate then passed to the beneficiaries in full property, and the purpose of the testator in that regard was accomplished. To repeat, we cannot doubt that the testator desired to accomplish these ends: 1. To provide ample revenue for each of his children during his or her life; 2. To prevent the descendants of his son from inheriting any part of his estate; 3. Upon the death of all his children, to give one-half of his estate to the descendants of his daughters, and the other half to his brothers and sisters and their descendants.

"Aside from some special legacies, these are all or the main purposes sought to be accomplished. This can all be done without violating any law, and without giving an unnatural or strained construction to any language contained in the will. This will be admitted if the concession be made that it was competent for him to create a power. . . .

"But, it is contended, powers cannot exist in this state, for we have no statute of uses, and a power was but the right to appoint a use, which, under the statute, drew to it the legal title. I presume it was never contended before that powers did not exist at common law, and most likely the learned counsel for respondent do not wish to be understood as contending for that proposition. If they did not exist at common law, when were they authorized? Certainly not by the statute of uses. That statute recognized that they were in common use as to equitable estates, and its purpose was to crush out both trusts and powers. If the right to create a power did not exist, one could not have been made to dispose of equitable estates. Why were they efficacious as to equitable estates, and of no avail as to legal estates, and how did the statute enable the land owner to dispose of freehold estates through the medium of a power? No doubt, powers, as known to the profession, are those which depended for their efficacy upon the statute of uses; and the reason why, in England, powers depended for their efficacy upon the statute of uses was because of the restrictions upon conveyancing which existed at common law. This is most conclusively and elaborately shown by Sugden in the introduction to his work on Powers. It was not only, nor principally, because a freehold estate could be created only by livery of seisin, or by some other solemn and public transfer, but because freehold estates could not be created to commence in futuro; nor could a power be reserved to the grantor or given to any other person to limit the estate or create any charge upon it in derogation of the estates created by the original feoffment. The author proceeds to show some devices resorted to at common law, and how, by changing the beneficiary interest into mere equities, almost perfect freedom of alienation was attained, and then how, by the statute of uses, almost a like freedom of alienation resulted as to freehold estates; and, finally, he sums up the effect of the statute upon conveyancing in the following words, which are not altogether in accord with the vehement denunciation of trusts and powers by the learned counsel for respondents: 'The statute is generally considered as having had only the effect of enabling the conveyancer to shift the legal estate from one to another by mere words, in a way which ill accorded with the common law, but is excellently adapted to the increased opulence of the country. It, however, also gave legal effect to modifications of property, which were repugnant to the common law, but are admirably suited to the varying wants and wishes of mankind. It has, moreover, had the beneficial operation of introducing an unrivaled code of equitable jurisprudence, which every admirer of the law of real property must wish forever to remain sacred, and unconfounded with the strict rules of law. In comparing what the statute was in-



tended to perform with what it actually has performed, one can hardly doubt that almost any other legislative measure which opposed the confirmed habits of the people in disposing of their property would have led to the same results. This should operate as a lesson to the legislature not vainly to oppose the current of general opinion, for, although diverted for a time, it will ultimately regain its old channel, in spite of accumulated acts of parliament, which become a dead letter, and have a strong tendency to bring the most wholesome laws into disrepute.

"I repeat, therefore, that powers were not created by the statute of uses; but, as they existed in England, they depended for their efficacy upon the statute, because, and only because, by means of that statute they were relieved from the restrictions upon alienation which existed at common law, and of course where these restrictions do not exist no statute is needed to give efficacy to powers. It is not a matter of interest to inquire whether everything could be done here under a power which could have been accomplished in England under the statute of uses. Doubtless, the use of powers is subject to the restrictions which exist in this state upon conveyancing and in this case to all limitations upon testamentary disposition of property. The direction in this will is to convey to ascertained persons, upon the expiration of a lawful trust, definite and fixed interests in the estate which has been the subject of the trust. The estates to be conveyed are present estates in fee simple. No reason occurs to me why such a power should be held invalid. . . . I also concur with Mr. Justice Harrison in the view that the will may also be maintained as a direct devise, if powers do not exist in this state." Mr. Justice Harrison, also dissenting, concurred in the above opinion.

MR. CHIEF JUSTICE BEATTY also dissented, and said that the question to be decided was: "If, in the creation of a valid testamentary trust, the testator directs and empowers his trustees upon the termination of the trust to convey the remainder, is that an unlawful means of transferring the property to the objects of his bounty?

"A trust to convey is, of course, forbidden by statute, and if the will of Senator Fair attempts to create a trust to convey, it must, at least to that extent, fail. If his grandchildren and brothers and sisters can take only through the medium of such unlawful trust, they cannot take at all.

"But to me it seems a misuse of terms to say that this is a trust to convey. It is a perfectly valid trust for other purposes, and for a lawful term. The conveyance which the trustees are directed to make at the termination of the trust is a mere incident. I still adhere to my original opinion, that although upon its more obvious construction the will was designed to create

an invalid trust to convey, in addition to the valid trust or trusts, it is nevertheless susceptible of a construction more favorable to testacy, which, for that reason, it is our duty to adopt. I still think it can be construed as a devise to the trustees of a life estate only, with an added power to convey the remainder, and I am not shaken in this opinion by the argument so much insisted upon in the opinion of the court, that an estate in fee in the trustees was essential to enable them to carry out the evident purposes of the testator. If he could create a lawful power to convey, as distinct from a trust to convey, the trustees could, under such power, not only transfer and convey the remainder to the grandchildren and brothers and sisters, but they could also sell and convey, and reinvest the proceeds of, any of the property embraced in the trust, as by one clause of the will they were authorized and empowered to do. In *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 587, 40 Pac. 810, it was held by this court that the donee of a testamentary power could make an effectual conveyance of an estate in which she had no interest. It is true that the power in that case would have been lawful as a trust, and the case is only cited to prove that this court has heretofore approved the doctrine—which it would seem difficult to deny—that an estate may be conveyed under a power as effectively as by a trustee in whom the estate is vested.

"It only remains, therefore, to inquire whether, under the laws of California, it is competent for the creator of a trust, whether by will or deed, to empower his trustee, at the expiration of the trust term and upon the completion of his trust duties, to transfer and convey the property to the person or persons to whom the grantor or testator desires it to go. Unless such power is denied or forbidden by positive law, there is no conceivable reason why it should be held unlawful. It contravenes no policy declared or implied in any of the statutory law of the state, and is sanctioned by the most elementary principles of the common law. It is one mode, and a perfectly natural, just, and unobjectionable mode, of doing what is expressly authorized by section 864 of the Civil Code, with reference to which I can only repeat what I said in my former opinion.

"Upon these grounds I dissent from the judgment of affirmance. . . .

"It is manifest from the terms of paragraph 15 of the will that it was the desire of the testator that his children should have no interest in his estate, other than the income thereof, during their lives, and that they should have no voice in the management or control of his estate; that no part of his estate, or of the income thereof, should ever belong to the issue of his son Charles; and that upon the death of the last surviving child one-half of his entire estate should belong to the descendants of his two

daughters, or of the survivor of them, and the other half, in equal shares, to his brothers and sisters, and their descendants by right of representation. If there is no legal objection to the form in which this desire has been expressed, it has become the will of the decedent; which the beneficiaries therein named are entitled to have enforced. The will of a testator is his expressed intention to dispose of his property in accordance with his desires, and if this intention is expressed in conformity with the requirements of law, it is the duty of courts to give it effect. The right of the owner of property to make a testamentary disposition thereof according to his own choice or preference is a wise provision of legislation, and its exercise within the limits fixed by the statute is a sacred right, which courts ought always to uphold.

“Certain well-settled rules of interpretation are, that the will shall receive such a construction as will make it effective, rather than void (Civ. Code, sec. 1643; *Toland v. Toland*, 123 Cal. 140, 55 Pac. 681); and that, of two modes of interpreting a will, that shall be preferred which shall prevent intestacy: Civ. Code, sec. 1326; *Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552. The primary rule of all interpretation is, that the will is to be construed according to the intention of the testator: Civ. Code, sec. 1317. For the purpose of ascertaining this intention, the language employed by him is to be interpreted by legal rules of construction, and the words used in the clause to be construed are to receive the first consideration; but his intention is the ultimate object to be sought in determining the construction to be given to these words, and is to be ascertained upon a consideration of the entire instrument. ‘We must take into account the other provisions of the will, and the general purpose deducible from its terms, for the purpose of ascertaining the intention of the testator, as expressed by his language’: *Matter of Young*, 145 N. Y. 538, 40 N. E. 226. If this intention is clear, it will control the meaning that would otherwise be given to particular words or phrases used by him. When the general intention is thus ascertained, it will control any particular intention which relates merely to the manner in which such general intention is to be carried into effect, and the terms employed by the testator are to be liberally construed, for the purpose of giving it effect, provided it is consistent with the rules of law: *Welch v. Huse*, 49 Cal. 509. ‘It is a familiar rule in the construction of wills, that the intention of the testator is to govern, although it may be opposed to some of the words of the will, and that the general intention is to control any particular intention, especially when the particular intention relates to the manner by which the general intention is to be effectuated’: *Malcolm v. Malcolm*, 3 Cush. 477. The rule was stated by the master of the rolls in *Thellusson v. Woodford*, 4 Ves. 329, as follows: ‘If the court can see a general intention consistent with the rules



of law, but the testator has attempted to carry that into effect in a way that is not permitted, the court is to give effect to the general intention, though the particular mode shall fail.' In determining whether the language of the will will permit effect to be given to the intention, 'the question is, not whether the language will bear some other construction—a construction which will defeat the intention, or render the provisions of the will illegal and void—but whether it will permit a lawful intention to have effect': *Everitt v. Everitt*, 29 N. Y. 95. After the intention has been thus ascertained, courts will then apply the rules of law for the purpose of determining whether such intention can be carried into effect. If it contravenes any provision of law, the will will be held invalid, not for the reason that it does not express the intention of the testator, but because the law will not permit such intention to be carried into effect.

"Section 857 of the Civil Code limits the creation of express trusts in real property to the purposes therein enumerated. As this section does not authorize the creation of a trust in real property for the purpose of conveying it to another, it ought not to be held that such conveyance was one of the 'purposes' for which the testator intended the trust created by his will, unless such construction is demanded upon a consideration of the entire instrument, including the manifest objects and purposes of the will, as well as the language used by him in this direction to the trustees: *Manice v. Manice*, 43 N. Y. 362. Courts lean in favor of the preservation of all such valid objects of a will as can be separated from those that are invalid, without defeating the general intent of the testator: *Harrison v. Harrison*, 36 N. Y. 547. Section 1317 of the Civil Code declares that 'where the intention cannot have effect to its full extent, it must have effect as far as possible.' In *Cross v. United States Trust Co.*, 131 N. Y. 339, 27 Am. St. Rep. 597, 30 N. E. 125, the principle was stated to be, that where several trusts are created by a will, which are independent of each other, and each complete in itself, some of which are legal and others illegal, and the legal can be separated from the illegal, and upheld without doing injustice or defeating what the testator might be presumed to wish, the illegal trusts may be cut off and the legal permitted to stand.

"For the purpose, therefore, of determining whether the provision in the will for a conveyance of the trust property defeats the entire trust, it is proper to consider whether such conveyance is essential to carrying into effect the intention of the testator with reference to the disposition of his estate at the death of his last surviving child, and whether his general intention in reference to the property will be in any respect affected by disregarding this provision. Substance is not to be sacrificed to form, and if this provision is only a direction to the trustees to do that

which they would have been authorized to do without the direction, or if the same result would follow with or without such conveyance, or if the persons to whom they are directed to transfer and convey the property would have the same interest therein, whether such conveyance is made or not, or would be entitled to demand such conveyance irrespective of this provision, the direction to convey the property does not become a 'trust,' even though it has been so termed in the will, and the execution of the conveyance will be held not to be one of the 'purposes' for which the trust was created.

"The trust created by the will of Senator Fair is an executed rather than an executory trust; that is, all of the directions for its execution are expressed in the will, so that the trustees have nothing to do but to carry out its provisions in accordance with the letter of the will. There are no duties to be performed by them; in regard to the conveyance, which involve the exercise of judgment or discretion on their part, or in which they are to act in accordance with the direction of any other than the testator. In the language of the books, the testator has been his own conveyancer. He has expressed in definite terms, the form of the conveyance which the trustees are to make, the property to be conveyed, and the persons to whom the conveyance is to be made.

"An executed trust may at the same time be an active trust; that is, the trustees may have active duties to perform during the continuance of their estate, such as the care and improvement of the property, the receipt and application of its income. If, however, at the termination of their estate, the property will, under the terms of the trust, vest in the ultimate beneficiaries without any act or duty on the part of the trustees it is an executed trust at the date of its creation. Mr. Perry, in his treatise on Trusts, says (Perry on Trusts, sec. 359): 'All trusts are executory in one sense of the word; that is, the trustee must have some duty, either active or passive, to perform, so that the statute of uses shall not execute the estate in the cestui que trust and leave nothing in the trustee. But such is not the meaning of judges when they speak of executed trusts and executory trusts. These words refer rather to the manner and perfection of their creation than to the action of the trustee in administering the property. Thus a trust created by a deed or will, so clear and certain in all its terms and limitations that a trustee has nothing to do but to carry out all the provisions of the instrument according to its letter, is called an executed trust. On the other hand, an executory trust is where an estate is conveyed to a trustee upon trust to be by him conveyed or settled, upon other trusts, in certain contingencies or upon certain events, and these other trusts are imperfectly stated, or mere outlines of them are stated, to be afterward drawn out in a formal manner, and are to be carried into

effect according to the final form which the details and limitations shall take under the directions thus given. They are called executory, not because the trust is to be performed in the future, but because the trust instrument itself is to be molded into form and perfected according to the outlines or instructions made or left by the settlor or testator.' The connection in which the phrase 'conveyed or settled' is used in the text clearly indicates that these words are used as equivalents, and that the conveyance therein referred to is one which is to be made by way of settlement. In a note to this section the author says: 'A mere direction to convey will not render the trust executory, if the directions are so clear and the limitations are so certainly defined that there is nothing to do but to convey in accordance with them. In order that the trust may be executory, there must be some room for construction, in order to determine the intention of the settlor; that is, to determine what limitations shall be made, and what shall not be introduced into the conveyance to be made.'

"Mr. Pomeroy (2 Pomeroy's Equity Jurisprudence, sec. 1000) says: 'Giving property to a trustee upon trust to convey to a person, or upon trust to convey it upon certain specified trusts, does not render the trust executory'; and gives the following quotation from the opinion of Lord St. Leonards in *Egerton v. Earl Brownlow*, 4 H. L. Cas. 210: 'All trusts are in a sense executory, because a trust cannot be executed except by conveyance, and therefore there is something always to be done, but that is not the sense which a court of equity puts upon the term "executory trust." A court of equity considers an executory trust as distinguished from a trust executing itself, and distinguishes it in this manner: Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is? Or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates?'

"It is sometimes provided in the instrument creating the trust, that after the execution of the trust specifically prescribed the trustees shall divide the trust property, and upon such division convey it to certain beneficiaries then to be ascertained. In such cases the trust is executory, and the beneficiaries take no interest in the property, except by virtue of the conveyance. The trustees are clothed with a discretionary power, which can be exercised only by themselves, or under the supervision of a court of chancery: *Gilman v. Reddington*, 24 N. Y. 9; *Manice v. Manice*, 43 N. Y. 303; *Cooke v. Pratt*, 98 N. Y. 35; *De Kay v. Irving*, 5 Denio, 646. So, too, when the conveyance is to be made in accordance with the appointment of a designated beneficiary or a third person, the trustees have an active duty to perform for the purpose



of completing their trust, and the author of the trust is not his own conveyancer. In the present case, however, the trustees are not directed or authorized to divide the trust property, and any attempted division by them would be in excess of their power and nugatory. They are authorized simply to convey, upon the death of the last surviving child of the testator, one-fourth part of the estate to the descendants of his daughter Theresa Oelrichs, one-fourth part to the descendants of his daughter Virginia, and the remaining one-half to his brothers and sisters, and to the children of any deceased brother or sister by right of representation. The conveyance, as thus authorized, is of undivided portions of the estate, and those to whom it is to be made will hold the same as tenants in common.

"In *Bruner v. Meigs*, 64 N. Y. 506, the testator devised his whole estate to trustees upon a trust, among others, to divide the same into as many shares as he left children surviving him, and to apply the income of each share to the use of the child for whom it was held, and, upon the death of such child, to convey and transfer the share of the estate held for it to certain designated beneficiaries. The court held that 'the power and direction to transfer and convey the share or portion of the estate to those entitled under the will, after the death of the cestui que trust for life, did not constitute a trust, or require the estate to be vested in the executors and trustees named.'

"In *Bacon's Appeal*, 57 Pa. St. 504, the testator devised property to trustees, in trust, to receive the income and pay the same to his daughters, respectively, during their lives, and after their decease to convey the same to their respective heirs. It was held that, as the trustees were but the conduit through which the title was to pass no conveyance was necessary, the court saying: 'In this state, when lands are given by will, in trust to be conveyed, when no other power or duty is assigned to the trustee, when he has nothing to do with the enjoyment of the property, and is only an instrument to enable the cestui que use to acquire the legal estate, it has been understood that the conveyance is unnecessary. At most, it can be but a matter of form, rather than of substance. The cestui que trust, being entitled to the whole beneficial enjoyment, and the trustees having no right to interfere with it, no reason is apparent why a legal title should be held continuing in the latter. A severance of the legal right from the beneficial ownership is not to be maintained without some reason. In the case before us, the purpose of the trust was accomplished when Mrs. Bacon died. The testator did not intend that the trustees should hold any estate after her death. He contemplated its immediate transmission to the remaindermen—a transmission by conveyance, indeed, but no holding in trust for those in remainder. There was, therefore, nothing substantial to be secured

by treating the legal title as remaining in the trustees and only an equitable interest in Mrs. Bacon.'

"In *Weston v. Weston*, 125 Mass. 268, the testator gave the residue of his property to trustees upon the trust to apply a portion of the income to the support of the widow, and after her death to 'convey, transfer, and pay' the trust estate to his children. The court said: 'We are of opinion that the will gave to Nathanael and Lucy each a vested equitable estate expectant on the termination of the life estate of the testator's wife, and liable to be divested only on her death during the life of the testator's wife without issue. The interest in the residue was given by the will, not by the conveyance from the trustees. Such conveyance is necessary only to make that a legal estate or interest which under the will and prior to the conveyance was an equitable interest. It was an equitable remainder after the equitable life interest of the testator's wife, and vesting immediately on the death of the testator.'

"In *Phipps v. Ackers*, 9 Clark & F. 583, the testator devised his estate to trustees, in trust, to convey it to his godson on his attaining the age of twenty-one years. The question before the court was the right to the income that had accrued during his minority, and this was held to depend upon whether the remainder was vested in him at the death of the testator. It was held that the son took a vested estate in fee, liable to be divested in the event of his dying under the age of twenty-one. In giving his opinion, Lord Lyndhurst said: 'The question to be considered is, whether the direction to convey makes any difference with respect to the disposition of the property. I am clearly of the opinion that it does not, and I agree entirely in what fell from Sir William Grant in the case of *Stanley v. Stanley*, 16 Ves. 491, that the right is not affected by the direction to convey, but that the conveyance must conform to the right, and that the will itself is an equitable conveyance until that is displaced by the legal conveyance which is directed to be made.'

"In *Campbell v. Stokes*, 142 N. Y. 23, 36 N. E. 811, the testator devised his estate, in equal shares, to trustees, to be held by them for each of his children, to apply the income thereof to their use, and, upon the death of a child for whom the same was held, to convey, transfer, and pay over the share to its issue. Upon this provision of the will the court said: 'The direction that the trustees, on the death of the parent, should "convey, transfer, and pay over and deliver" the parent's share to his or her issue was inserted to emphasize the right of the remaindermen, and was not the foundation of their title. The whole scope of the will negatives the idea that their rights were dependent in any way on the action of the trustees, or that the vesting of their interests awaited the exercise by the trustees of the power to transfer, convey,

and deliver the share to the issue so entitled. The testator did not intend to die intestate as to any portion of his property. The whole was given to his children and their issue. The trust was created to secure to his sons and daughters the beneficial enjoyment of their several shares for life, and to preserve the principal for their issue.'

"In *Toms v. Williams*, 41 Mich. 566, 2 N. W. 814, the testator devised his estate to trustees, in trust, to make certain dispositions of the income, and thereafter to transfer and convey the property to the children of his deceased brother. The court held that the making of the conveyance would be a mere execution of a formal transfer of what had already passed in fact, and that the failure to make the conveyance would not deprive those persons of the estates which had vested in them, saying: 'The will itself creates the rights and points out their owners.'

"In *Cushing v. Blake*, 30 N. J. Eq. 689, it was held that 'a mere direction to the trustee to convey will not convert a trust into an executory trust. If the trusts are fully and accurately expressed, the rights of the beneficiaries are not affected by the direction to convey. The conveyance must conform to their rights as declared, and the equitable estate vests immediately': See, also, *Gilman v. Reddington*, 24 N. Y. 9; *Moose v. Appleby*, 36 Hun, 368; affirmed, 108 N. Y. 237, 15 N. E. 377; *Doe v. Considine*, 6 Wall. 458; *Bowen v. Chase*, 94 U. S. 812; *Scofield v. Olcott*, 120 Ill. 326, 11 N. E. 351.

"*Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805, is relied upon by respondents as holding a different rule in New York from that expressed in the foregoing cases from that state; but we are of the opinion that it was not so intended by the court. The rule which was declared in *Moore v. Appleby* is neither overruled nor questioned in the opinion, and in the subsequent case of *Campbell v. Stokes* the rule in *Moore v. Appleby* was followed, and *Townshend v. Frommer* disregarded; and later, in *Paget v. Melcher*, 156 N. Y. 399, 51 N. E. 24, it was, in effect, declared that a direction to the trustees to convey the estate to a designated class upon the termination of the lives for whose benefit the trust was established, created a vested remainder in that class. There are also other expressions in the opinion which are not in harmony with other opinions by the same court, and it is in professed disregard of *Bowen v. Chase*, 94 U. S. 812. The action was ejectment, for certain property which had been conveyed to a trustee, subject to a mortgage then existing upon it, upon trust to apply the income to the use of Mrs. Curtis, during her lifetime, and 'upon the further trust' to convey the same, at her death, in fee simple, to such of her children as should then be living. This mortgage had been foreclosed in an action brought in the lifetime of Mrs. Curtis, against herself and the trustee, but her children



then living were not made parties to the suit. The plaintiff's right to the land was derived through conveyances from the children of Mrs. Curtis, and the defendant's right through the sale under this foreclosure. The question to be determined by the court was, whether the children of Mrs. Curtis were necessary parties to the foreclosure, and underlying this question was a determination of the character and extent of the estate taken by the trustee. The court held that the trust deed conferred upon the trustee the entire estate in the land, and also a power in trust to convey the same to the children upon the death of Mrs. Curtis; that, therefore, the children had only a contingent remainder, which would not vest in interest until her death, and consequently they were not necessary parties to the foreclosure. To the extent that this decision rests upon the statement in the opinion that the element of contingency was caused by the uncertainty as to the precise persons in whom would exist the right to enforce the execution of the power in trust, and the conclusion that this uncertainty prevented the remainder from vesting, it is at variance with the provisions of section 694 of the Civil Code of this state, and is not in accordance with other decisions in that state: See *Levy v. Levy*, 79 Hun, 290, 29 N. Y. Supp. 384. The case itself does not appear to have been followed in any subsequent case in that court, nor does the rule therein stated appear to have received the approval of the courts of that state. In *Campbell v. Stokes*, 142 N. Y. 23, 36 N. E. 811, the same court affirmed the rule declared in *Moore v. Appleby*, 36 Hun, 368, 108 N. Y. 237, 15 N. E. 377, and, after saying that the case of *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805, was not intended to overturn the doctrine therein declared, said: 'The case was peculiar and anomalous, and involved complicated questions under the law of trusts and powers.' *Levy v. Levy*, 79 Hun, 290, 29 N. Y. Supp. 384, involved the same question, and in commenting upon *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805, the court said: 'After an examination and comparison of that case with the decision in the case of *Campbell v. Stokes*, I have been unable to reconcile the same. And as the rule laid down in the latter case in respect to the vesting of estates seems to be that which most clearly conforms to the provisions of the Revised Statutes defining such estates, it should be followed.' Mr. Chapin, in his treatise on Express Trusts, says (page 498): 'But, in general the case of *Townshend v. Frommer* must be regarded as highly peculiar, and be treated with caution.' The court itself appears to have been impressed with the peculiarity of the case, as may be seen by its remarks (page 461): 'In view of the many phases of uses and trusts presented to the courts, it is not remarkable that we should find observations in the opinions of judges not easily reconcilable with the conclusion in a particular case. I am not aware

that any case presenting the precise question here can be found, though some may have a likeness in particular features.' It is also worthy of observation that the opinion in *Campbell v. Stokes* was written by Judge Andrews, who dissented from the opinion in *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805, and was concurred in by the entire court, including five of the judges who had rendered the decision in *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805. It is quite possible that there were facts in the record which are not fully stated in the report of the case, from which the court was led to the conclusion that the trustee took the entire fee in the land, and that the children took no estate therein; and this conclusion may also have been reached upon the ground that, as the land was conveyed to the trustee with a power in trust by which he was required to convey the estate 'in fee simple,' he took such an estate by the trust deed: See *Doe v. Field*, 2 Barn. & Adol. 564.

"Under the provisions of the will the trustees take an estate in the land devised to them, during the lives of the testator's children and the survivor of them, and no more. There are no words therein expressing an intention to confer upon them a fee in the land, its language being that they are 'to have and to hold the same, in trust, during the lives' of the testator's children, and in further trust to dispose of the income, during the life or lives' of said children. Section 871 of the Civil Code provides: 'When the purpose for which an express trust was created ceases, the estate of the trustees also ceases.' The 'estate of the trustee' is that which is necessary to enable him to execute the trust imposed upon him. The estate embraced in the trust—that is, the extent or quantum of interest taken by him—is determined by a consideration of the objects and purposes of the trust, rather than by a strict application of legal rules to the construction of the terms of the conveyance by which the estate is limited to him: *Sears v. Russell*, 8 Gray, 86. If an estate in fee is necessary to enable him to perform the duties of the trust, such estate will be held to have been taken by him, even though it is not given in express terms, and, on the other hand, though the form of the conveyance is such as would imply a fee, if necessary for the purposes of the trust, his estate will cease upon the complete execution of the trust. 'Where no intention to the contrary appears, the language used in creating the estate will be limited to the purposes of its creation': *Doe v. Considine*, 6 Wall. 458. Mr. Perry says (section 320): 'The general rule is, that whether words of inheritance in the trustee are or are not in the deed, the trustee will take an estate adequate to the execution of the trust, and no more nor less. Courts will abridge the estate where words of inheritance are used, if the execution of the trust does not require a fee, and so they will enlarge the estate if no words of inheritance are used in a deed.' Jarman, in his treat-

ise on Wills, says (2 Jarman on Wills, 1155): 'Trustees take exactly that quantity of interest which the purposes of the trust require, and the question is, not whether the testator has used words of limitation, or expressions adequate to carry an estate of inheritance, but whether the exigencies of the trust, as they appear on the face of the will, or refer to events subsequent to the testator's death, demand the fee simple, or can be satisfied by any, and what, less estate.'

"The provision in section 863 of the Civil Code, that, 'except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust,' is limited by the succeeding sections to the estate given to the trustee for the purposes of the trust, and does not include any estate in the property which is not required by the trust: *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 587, 40 Pac. 810. This is clearly implied from the provision in section 866 of the Civil Code, that 'every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors,' and by the provisions of section 864, that, notwithstanding the provision of the previous section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong at the termination of the trust. If, in the creation of the trust, he desires to dispose of any estate in the property which is not embraced in the trust, he need not use the term 'prescribe' or shall belong in order to make his purpose effective, but if he incorporates into the trust instrument an intelligible designation of the persons that he wishes to enjoy the property upon the termination of the trust, or to whom he wishes the property to go, he will be held to have 'prescribed' an intention that the estate 'shall belong, to those persons, and thus to have otherwise disposed of the estate. Whether he has prescribed any such intention is to be determined upon a proper construction of the language used by him, considered with reference to the manifest purpose of his will, as deduced from the entire instrument. In *Scotfield v. Olcott*, 120 Ill. 362, 11 N. E. 351, the will provided for the support of the testator's widow, during her lifetime, out of the income of the estate, and that thereupon certain legacies should be paid, and upon their payment the trustees should convey, assign, and deliver all the rest and residue of his estate to his son. The court said: 'The testator in this case evidently intended that the whole of the remainder of his estate should be used for the support of his wife as long as she lived, and that upon her death, and after the payment of certain legacies, the residue should belong to his son,' and held that it vested in him at his father's death, notwithstanding the provision in the will for a conveyance to him by the trustee. In *Gilman v. Reddington*, 24 N. Y. 9, where the will provided that



upon the happening of a certain event the trust property was to be 'paid, conveyed, or made over' to certain beneficiaries, it was held that during the term of the trust the title was wholly in the trustees, as a temporary estate, but that there was created a devise of the future estate as a remainder in fee, which vested in the beneficiaries at the death of the testator, and that they would be entitled to the possession and enjoyment of the estate at the expiration of the trust. In *Manice v. Manice*, 43 N. Y. 378, the court said: 'The direction to the trustees to pay over the principal share of each grandchild on his or her attaining the age of twenty-one years is a sufficient devise of the property, and will vest it in the devisee.' In *Moore v. Appleby*, 36 Hun, 368, 108 N. Y. 237, 15 N. E. 877, it was held that under a statute containing the same provision as in section 863, it was designed that the trustee in the case of an express trust should be vested with so much of the estate during the continuance of the trust as should be necessary to maintain and execute it, and subject to that that the property in remainder should devolve upon the persons entitled to it in remainder, and that the remainder thus vested was not defeated by a direction to the trustees to transfer and convey the estate to the remaindermen upon the death of the life cestui que trust, for the reason that such direction was not a purpose for which an express trust was authorized.

"The law favors vested rather than contingent remainders, and in any case of uncertainty courts will construe the words of a will so that the remainder will vest at as early a period as possible. Words in a will directing land to be conveyed to, or divided among remaindermen after the termination of a particular estate are always presumed, unless clearly controlled by other provisions of the instrument, to relate to the beginning of enjoyment by the remaindermen, and not to the vesting of the title in them. The uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, is what renders the remainder contingent. When the person to whom the remainder, after a life estate is limited, is ascertained, and the event upon which it is to take effect is certain to happen, it is a vested remainder, although by its terms it may be entirely defeated by the death of such person before the determination of the particular estate. It is the present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder; *Williamson v. Field*, 2 Sand. Ch. 553; *Moore v. Littell*, 41 N. Y. 66; 4 Kent's Commentaries, 203. Where an estate is granted to one for life, and to such of his children as shall be living after his death, a present right to the future possession vests at once in such children as are living, subject to open and let in after-born children,

and to be devested as to those who shall die without issue: *Croxall v. Shererd*, 5 Wall. 288; *McArthur v. Scott*, 113 U. S. 380, 5-Sup. Ct. Rep. 652; *Gilman v. Reddington*, 24 N. Y. 9; *Brown v. Lawrence*, 3 Cush. 397; *Blanchard v. Blanchard*, 1 Allen, 223.

"These principles are embodied in the following provisions of the Civil Code: 'Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death': Civ. Code, sec. 1341. 'A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes, also, all persons coming within the description before the time to which possession is postponed': Civ. Code, sec. 1337. 'A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the intermediate or precedent interest': Civ. Code, sec. 694."

MR. JUSTICE HARRISON ALSO DISSENTED, and adhered to his opinion rendered upon the previous hearing of the case as follows:

"At the death of the testator there were living, of the beneficiaries designated in paragraph 15 of his will, the infant son of Mrs. Oelrichs, five brothers and sisters, and the issue of a deceased brother. These persons will have a right to the immediate possession of his property upon the termination of the estate of the trustees, defeasible, however, upon their death before that time; and if before the time for such possession shall arrive there shall be other persons born into the class for whom provision is made in the will, they will be included in such provision. If the testator's children had all died the day after his own death, the estate of the trustees would have terminated, and the child of Mrs. Oelrichs would have been entitled to the possession of one-half of the estate, and his collateral kindred to the other half.

"The foregoing considerations lead to the conclusion, that by the will of Senator Fair an equitable remainder in his estate was devised to the persons to whom the trustees were directed to convey upon the death of his last surviving child; that this remainder vested in those persons at the death of the testator, defeasible, however, upon their death prior to the death of his last surviving child, and subject to open and let in after-born members of the designated classes; that upon the death of the testator's last surviving child the estate of the trustees in the property will terminate, and a conveyance from them will neither enlarge nor diminish this remainder, but it will immediately vest in possession without any conveyance; that the provision for such conveyance did not create any 'trust' in the property, but was a mere direction to the trustees to make effective the other provisions of the

will, and is not to be construed as one of the 'purposes' for which the testator created the trust.

"The will does not suspend the power of alienation for a longer period than during the lives of persons in being at the death of the testator. The fact that a child of either of the testator's daughters, or of either of his brothers or sisters, may be en ventre sa mere at the death of his last surviving child will not have this effect. Such fact cannot be invoked to impair the validity of the trust. It is only the power of alienation which the statute forbids to be suspended, and this power is not suspended by reason of any difficulty or inconvenience that may attend its exercise. The suspension of alienation which is aimed at by the statute is such as is caused by the instrument creating the estate, and not such as arises from some disability on the part of the person in whom the estate is vested, such as infancy or other incapacity, or from any other cause outside of the instrument; *Toland v. Toland*, 123 Cal. 140, 55 Pac. 681; *Moore v. Littel*, 41 N. Y. 66; *Beardsley v. Hotchkiss*, 96 N. Y. 214. Section 29 of the Civil Code provides: 'A child conceived, but not born, is to be deemed an existing person, so far as may be necessary for its interests, in the event of its subsequent birth'; and section 1339 of the Civil Code provides: 'A child conceived, but not born until after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes answering to the description of the class.'

"The decree of distribution should be reversed."

**Trusts Void in Part.**—A will creating legal and illegal trusts may be permitted to stand and to be enforced so far as the legal trusts are concerned, if they can be separated from the illegal, and upheld without doing injustice or defeating what the testator must be presumed to have wished: *Cross v. United States Trust Co.*, 131 N. Y. 330, 27 Am. St. Rep. 597, 30 N. E. 125. See, too, *Hascall v. King*, 162 N. Y. 134, 76 Am. St. Rep. 302, 56 N. E. 515. But if the legal and illegal trusts are so connected as to constitute an entire scheme, so that the presumed wishes of the testator will be defeated if one portion is retained and other portions rejected, or if manifest injustice will result from such construction to the beneficiaries, then all the trusts must be considered together, and all must be held illegal, and must fail: *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, 28 N. E. 880. See, further, the monographic note to *Johnston's Estate*, 64 Am. St. Rep. 634-646, on the severability of perpetuities and forbidden trusts.

**Restraints on Alienation.**—Trusts offending the rule against restraints on alienation are discussed in *In re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97, and monographic note, 41 Pac. 772.



## CARPENTER v. COOK.

[132 Cal. 621, 64 Pac. 997.]

**TRUSTS—PASSIVE—USE OF GRANTOR.**—A trust created by deed to trustees, to hold during the lifetime of the grantor certain land and all rents, income, profits, and proceeds thereof, and the proceeds of any property sold or exchanged to the use of the grantor, and to sell and convey when directed by him to such person as he may direct, is a mere passive trust and void.

**TRUSTS, "TO SELL REAL ESTATE AND APPLY PROCEEDS** in accordance with the instrument creating the trust," to be valid under the statute, must impose an imperative duty upon the trustee, both to sell the property and to apply the proceeds by parting therewith according to the directions contained in the deed of trust.

**TRUSTS, "TO RECEIVE RENTS AND PROFITS OF REAL PROPERTY,** and pay them to, or apply them to, the use of any person," as provided by statute, imposes an active duty upon the trustee, to apply and distribute the rents and profits as directed by the deed creating the trust, and a mere passive trust to hold them for the use of the grantor is void.

**TRUSTS, TO HOLD PROPERTY,** do not constitute trusts to sell and dispose of the proceeds.

**TRUSTS, TO HOLD RENTS AND PROFITS** to the sole use of a certain person, are not trusts to receive rents and profits, and pay or apply them to any person. Such trusts are merely passive and void.

**TRUSTS—INTERVENING VALID AND INVALID PROVISIONS.**—If several trusts are so inextricably interwoven and mutually interdependent that the destruction of one mutilates and maims, in essential particulars, the trust scheme, the whole must fail.

**TRUSTS—ILLEGAL GIFT OF RESIDUE.**—A gift or trust of the "residue and remainder," after providing for an illegal primary trust, is void. If the primary trust is void, the trusts and limitations over must fail.

Mastick, Belcher & Mastick, and W. B. Treadwell, for the appellants.

T. J. Lyons, C. W. Slack, J. H. Durst, Hart & Cleary, and D. Stoney, for the respondents.

**622 HENSHAW, J.** This action was prosecuted by plaintiffs to quiet, against defendants, their title to certain real estate, plaintiffs claiming the legal title to the estate as trustees: 1. Under a deed of trust executed by one Amasa P. Willey in his lifetime; and 2. As trustees under the will of said Willey, by the terms of which he devised to them the property in question, upon the trusts declared in a deed of trust executed by

him in his lifetime. By its judgment the court decreed: 1. That the trusts created by the deed of trust were void, and that consequently, under this instrument, the trustees had no title; 2. That whether or not they had title by virtue of the will was a question to be resolved in the first instance by the court in which administration of the estate of Willey was pending. From the judgment thus rendered against them plaintiffs appeal.

Upon this appeal we are concerned solely with the question of the validity or the invalidity of the trusts declared by the deed. Of those trusts, one was to operate during the lifetime of the settlor; the others were to operate upon and after the death of the settlor, upon the "residue" of the trust property remaining at his death. As has been said, by his will the testator <sup>623</sup> conveyed his property to these same trustees, upon the trusts declared in his deed of trust. The first of those trusts having terminated by his death, the trusts which could be operative under the will necessarily are only those designed to follow thereafter. Whether or not these trusts, even though the deed of trust be void, may still be effective by virtue of their re-enactment in the will, is a question, in the first instance, to be determined by the court in probate (see *Estate of Willey*, 128 Cal. 1, 60 Pac. 471), and therefore not the subject of consideration here. We deem it important to say this in emphasis of the fact that upon this appeal the court is dealing only with the question of the validity of the trust scheme created by Willey's deed.

In his lifetime, Willey conveyed all the real estate which he owned or possessed, to these plaintiffs, as trustees, in trust, "for the uses and purposes following; that is to say:

"1. During the lifetime of the said party of the first part, to hold the same, and all the rents, income, profits, and proceeds thereof, and all property received in exchange therefor, to the sole use and behoof of the said party of the first part; and, whenever directed by the party of the first part, to bargain, sell, convey, assign, transfer, and deliver said property, or any part thereof, to such person or persons as the said party of the first part shall direct, and to hold the proceeds of any such sale, or any property received in exchange therefor, to the sole use and behoof of the said party of the first part.

"2. Upon and after the death of the said party of the first part, to have, hold, and possess all and singular the residue and remainder of said property and effects, to lease and demise the

same, and to receive the rents, income, and profits thereof." Following this is an elaborate trust scheme, unnecessary here to be set out.

Manifestly, the trust declared in the first clause of the deed is a trust designed to continue through the life, and to terminate upon the death, of the settlor. It must be an express trust permitted by section 857 of the Civil Code, or it is void. That section is divided into four subdivisions. Subdivision 2 permits a trust in real property to mortgage or lease it for the benefit of annuitants or other legatees, or for the purpose of settling any charge thereon. Clearly, the trust here created is not referable to this subdivision. Subdivision 4 permits a trust to receive the rents and profits of real property, and to accumulate <sup>624</sup> the same for the purposes and within the limits prescribed in title 2 of the code. This has to do with accumulations during minorities of beneficiaries, and, of course, the trust in question does not belong to this class. Subdivision 1 permits a trust to sell real property and apply or dispose of the proceeds in accordance with the instrument creating the trust. In such a trust the essential elements are: 1. An imperative duty upon the trustee to sell, which means a disposition of the property for money; and 2. An equally imperative duty to apply or dispose of the proceeds in accordance with the instrument creating the trust. To apply or dispose of the proceeds is a plain direction and command that the trustee must part with the moneys obtained by the sale. Subdivision 3 permits a trust "to receive the rents and profits of real property, and pay them to or apply them to the use of" a specified person. Here, too, it is of the essence of the trust that there shall be imposed upon the trustee the active duty of applying, distributing, and apportioning the rents and profits in accordance with the directions of the trust. The trust here created is not a trust referable to any one or more of these specified classes. It is a trust, primarily, "to hold" the property, and its rents and income, "to the sole use and behoof of the settlor." A trust to hold property is not a trust to sell and dispose of the proceeds. A trust to hold rents and profits to the sole use and behoof of a person is not a trust to receive rents and profits, and pay them or apply them to the use of any person. It is a mere passive trust. It is a trust not specified by section 857 of the Civil Code, and is therefore void: *Jarvis v. Babcock*, 5 Barb. 139; *Verdin v. Slocum*, 71 N. Y. 347; *Hagerty v. Hager*, 9 Hun, 175. It cannot be successfully argued that this is



a trust under subdivision 3 of section 857. The language of the trust is, to hold the rents, income, and profits of the property, to the sole use and behoof of the party of the first part; not to pay or apply them to his use. The trustees are to do with them as the settlor may direct, and he might direct them to hold and accumulate them in an unlawful manner and to an unlawful extent.

It is equally impossible to find in this language a valid trust, under subdivision 1 of section 857—first, because, as has been said, it is essential to such a trust that the duty upon the trustees to sell should be imperative: *Cooke v. Platt*, 98 N. Y. 35; *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 587, 625 595, 40 Pac. 810. Here no such duty is imposed. The trustee is not to sell at all, either all or any part of the property, unless directed by the settlor, and then he is not alone to sell to such person or persons as the settlor may direct, but he may exchange property for other property, as clearly appears from the language, "to hold the proceeds of any such sale, or any property received in exchange therefor, to the sole use and behoof of the party of the first part." We think it too plainly apparent to need further exposition that the trust or trusts attempted to be created in the first clause of this deed are one and all wholly without the purview of section 857 of the Civil Code; and we pass to the consideration of the effect of the invalidity of this life trust upon the trusts to commence upon the death of the settlor.

It is a familiar principle that if several trusts are so inextricably interwoven, so mutually interdependent, that the destruction of one mutilates and maims in essential particulars the trust scheme, the whole must fall. In this case, the dependence of all succeeding trusts under this deed results—if it results at all—from the language above quoted from the second paragraph: "Upon and after the death of the said party of the first part to have, hold, and possess all and singular the residue and remainder of said property," for certain specified uses and trusts. Here it is apparent that it is only the residue, a legal phrase of well-defined meaning, which, after the settlor's death, is to be devoted to the purposes of the succeeding trusts. In *Limbray v. Gurr*, 6 Madd. 151, the rule applicable to this case is laid down in the following language: "Where a residue is given to a valid purpose, it will fall with the prior void purpose, if not capable of being ascertained except by the actual execution of that purpose"; and as *Jarman* expresses it (2

Jarman on Wills, 6th ed., 236): "A gift of the residue, after providing for an illegal object, is void." In *Cowen v. Rinaldo*, 82 Hun, 479, 31 N. Y. Supp. 555, will be found a learned discussion of the question here arising, and the court concludes: "But we have failed to find any case in which the primary trust has been held to be invalid, and the ulterior trusts or dispositions of the will have been held to be good. . . . The primary objects may still remain, and those that follow may be cut off. But if you cut off the primary object, upon what do the ulterior provisions depend?" In instance of the rule that when <sup>626</sup> the primary trust has been adjudged void, the trusts and limitations over have uniformly fallen, may be cited *Rice v. Barrett*, 102 N. Y. 161, 6 N. E. 898; *Beekman v. Bonsor*, 23 N. Y. 298, 80 Am. Dec. 269; *Dodge v. Pond*, 23 N. Y. 69; *Hone v. Van Schaick*, 20 Wend. 564; *Smith v. Edwards*, 88 N. Y. 92; *Fowler v. Ingersoll*, 127 N. Y. 472, 28 N. E. 471.

It follows, therefore (and this language has exclusive application to the trust scheme created and attempted to be set in operation by the deed of trust alone), that the trial court correctly decided that no title vested in the trustees by virtue of the deed of trust, and the judgment appealed from is therefore affirmed.

Van Dyke, J., Harrison, J., Garoutte, J., Temple, J., and Beatty, C. J., concurred.

McFARLAND, J., concurring. I concur in the judgment and in the opinion of Mr. Justice Henshaw. It is well to notice, however, that in *Estate of Willey*, 128 Cal. 1, 60 Pac. 471, the first clause of the deed to Carpenter and Boericke was not attacked on the ground that it attempted to create a trust not permitted by section 857 of the Civil Code. Moreover, in *Estate of Willey*, 128 Cal. 1, 60 Pac. 471, which dealt entirely with the will, the question whether or not said first clause of the deed was valid was immaterial. The will, of course, did not take effect until after the death of the testator, and the reference, in the will, to the deed embraced only those trusts declared in the deed which became operative after the testator's death; and for the uses and purposes of these latter trusts he devised and bequeathed to Carpenter and Boericke "all the property, real and personal, . . . of which I may die seised or possessed."

Rehearing denied.

**Trusts Void in Part.**—When some of the trusts of a will are legal and others illegal, if they are so connected as to constitute an entire scheme, so that the presumed wishes of the testator will be defeated if one portion is retained and other portions are rejected, or if manifest injustice will result from such construction to the beneficiaries, then all the trusts must be considered together, and all must fall: *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, 28 N. E. 880. See, also, *Eldred v. Meek*, 183 Ill. 26, 75 Am. St. Rep. 86, 55 N. E. 536; monographic note to *Johnston's Estate*, 64 Am. St. Rep. 634-646. However, where there are two trust objects, one of which is principal and the other alternative, and the latter only is void, the principal trust may stand and the other fall: *Hascall v. King*, 162 N. Y. 134, 76 Am. St. Rep. 802, 56 N. E. 515.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**CONNECTICUT.**

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STATE v. McKEE.

[73 Conn. 18, 46 Atl. 409.]

**CONSTITUTIONAL LAW—PUBLICATIONS.**—There is no constitutional right to publish every fact or statement simply because it is true.

**CONSTITUTIONAL LAW.—THE POWER OF THE STATE TO PUNISH ACTS AS INJURIOUS TO PUBLIC HEALTH, safety, or morals,** is not limited to acts within the adjudicated scope of the common-law offenses of nuisance and libel.

**CONSTITUTIONAL LAW.**—It is the duty of courts to give effect to a legitimate legislative purpose plainly indicated, if it can reasonably be done, and not to construe language so as to invalidate a statute when fairly susceptible of a construction consistent with its validity.

**CONSTITUTIONAL LAW—LIBERTY OF PRESS.**—A statute making it a penal offense to sell, or offer to sell, land, or give a publication principally made up of criminal news, police reports, and pictures and stories of bloodshed, lust and crime, does not violate constitutional guaranties that every person may freely speak, write, and publish his sentiments on all subjects, and that no law shall be passed to restrain the liberty of speech or of the press.

**PLEADINGS—COMPLAINT ON OBSCENE LITERATURE.** A complaint, under a statute prohibiting the sale or giving away of publications principally devoted to the publication of criminal news, police reports, or pictures, or stories of deeds of bloodshed, lust, and crime, is sufficient, if the offense is charged in the words of the statute.

**CONSTITUTIONAL LAW.—THE VALIDITY OF STATUTES IS A QUESTION OF LAW** for the court, and the jury is bound to accept its opinion as the law for the case.

**OBSCENE LITERATURE—GIST OF OFFENSE.**—Under a statute making it a penal offense to sell, offer for sale, lend or give, a paper principally made up of criminal news, police reports, and pictures and stories of lust, bloodshed, and crime, the gist of the offense is the massing of these immoralities in one publica-

tion for circulation, and demands that the paper shall be principally devoted to the publication of such material. The law cannot be evaded by intermingling other material, whether for the purpose of evasion or of securing attention to the main subject matter, so long as the principal resulting effect is the circulation of this massed immorality. It is for the jury to determine whether the papers in evidence were thus devoted to the publication of material claimed to be within the statutory description.

**CRIMINAL LAW—SALE OF PROHIBITED ARTICLES—AUTHORITY TO SERVANT TO SELL.**—In statutory offenses consisting in the sale of articles in violation of regulations for securing public order, the authority to a servant to sell the particular article charged as sold by the master may, without proof of any specific authority, be inferred from various circumstances, such as the relation of shopkeeper and selling clerk, coupled with proof that the article sold was placed by the master in the shop among other things that were to be sold, carelessness or negligence of the master in providing or keeping the articles sold, and other evidence legally tending to prove that the sale was made with the knowledge and consent of the master, provided such evidence does in fact satisfy the jury beyond a reasonable doubt that the servant in selling the article acted in pursuance of authority from the master.

**CRIMINAL LAW—IMMORAL PUBLICATION.**—In a prosecution for selling a paper devoted to immoral matter, the question whether the matter published therein comes within the statutory prohibition is for the court to determine, when the sale and the fact that the paper was devoted to the publication of the class of matter contained therein are admitted.

L. N. Blydenburgh and R. E. De Forest, for the appellant.

W. H. Williams, state's attorney, for the appellee.

**22** **HAMERSLEY, J.** The demurrer to the complaint was properly overruled. The only reasons specified in the demurrer that call for notice are these: "3. Because it [the act of 1895, on which the prosecution was brought] restricts the constitutional right to publish the truth; 4. Because it is not alleged that the matter is obscene, blasphemous, scandalous, or libelous."

There is no constitutional right to publish every fact or statement that may be true. Even the right to publish accurate reports of judicial proceedings is limited. The substance of the rule is briefly stated by Judge Cooley, in his work on Constitutional Limitations (page 449): "If the nature <sup>23</sup> of the case is such as to make it improper that the proceedings should be spread before the public, because of their immoral tendency or of the blasphemous or indecent character of the evidence exhibited, the publication, though impartial and full, will be a public offense, and punishable accordingly." This rule applies with a far wider range to ordinary matters.

If the fourth specification implies that the power of the state to punish acts as injurious to the public health, safety, or morals, is limited to acts within the adjudicated scope of the common-law offenses of nuisance and libel, it is unfounded. These elastic common-law crimes are based on the broad principle that conduct injurious to public health, safety, and morals, may be restrained and punished by the state, although the same conduct, if harmless, cannot validly be prevented. Though defined by an unwritten law, the crimes in fact, like most common-law rules, depend on legislative authority, and may be restricted or extended by the same power. Upon a prosecution of the common-law offense, the question whether the conduct charged is injurious may be a question of fact for the jury; but there are cases in which the legislature may withdraw from the offense certain specified acts as not injurious, or may declare certain conduct to be injurious and make such conduct a statutory offense; when this is done, the injurious nature of the conduct is determined—subject, in some instances, to judicial review—by the legislature, and is not a question of fact involved in a prosecution under such statute: *State v. Main*, 69 Conn. 123, 133, 61 Am. St. Rep. 30, 37 Atl. 80; *State v. Cunningham*, 25 Conn. 195, 203.

The definition of the perversion of the press to the injury of public morals, as the equivalent of conduct which at common law had been punished upon indictment for libel, is inadequate and unsound. It substitutes the effect for the cause. The law of libel, as related to such conduct, rests upon the principle of the power and duty of the state to protect each citizen from malicious injury, and society from attacks upon its safety as well as from the pollutions of immorality, and is coincident in its range with a large portion of the field covered by that principle, but does not mark its limits.

<sup>24</sup> This erroneous view was set forth with much ingenuity and ability in the argument of counsel reported in the comparatively recent case of *In re Rapier*, 143 U. S. 110, 12 Sup. Ct. Rep. 374; but the decision involved a condemnation of the view, although the opinion deals mainly with conclusions, without detailing the reasons, owing, as the court states, to the death of Mr. Justice Bradley who had been assigned to vindicate the conclusions.

If such an attempt to bottle up a broad principle of free government in the definite results of its past application could be made successful, it would in effect seriously narrow the



freedom of speech and press as now understood, as well as cripple the state in affording that protection to the individual and the public from wrongful acts which is a necessity to the enjoyment of real freedom.

It is, therefore, immaterial whether or not the conduct described in the statute has heretofore been held to be sufficient to support an indictment at common law for nuisance or libel. The legislature has declared that it does endanger public morals; and this it has the power to do unless the court can say that such declaration is plainly unfounded.

If the fourth specification simply implies that an information under the statute must contain an allegation that the prohibited publications are obscene, etc., it is wholly without merit. But the force of the demurrer is not entirely confined to the specified reasons. If for any reason the statute, or that portion of it under which the accused was prosecuted and punished, is unconstitutional or void, the demurrer should have been sustained.

The offense charged in the information is a violation of one of the provisions of section 2 of "An act relating to obscene literature," passed in 1895: Pub. Acts 1895, c. 205, p. 558. Possibly the section may be framed with looseness, may in some particulars be open to a construction inconsistent with its evident purpose, and invite judicious revision; but it is the duty of the court to give effect to a legitimate legislative purpose plainly indicated, if it can reasonably be <sup>25</sup> done, and not to construe language so as to invalidate an act when the language is fairly susceptible of a construction consistent with validity: *State v. Brennan's Liquors*, 25 Conn. 278, 289; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210, 227; *Wilton v. Weston*, 48 Conn. 325, 338; *State v. Lewis*, 51 Conn. 113, 127; *Miles v. Strong*, 68 Conn. 273, 287, 36 Atl. 55.

This act is evolved from one directed to the suppression of obscene literature, passed in 1834, which appears in successive revisions until and including that of 1875. In the last-named revision it reads as follows:

"Sec. 3. Every person who shall . . . . sell . . . . any printed . . . . matter, drawing or figure, of an obscene character, . . . . shall be fined. . . . .

"Sec. 4. Every person who shall . . . . introduce into any family, college, academy, or school, any printed or engraved matter containing obscene language, . . . . or any drawing or figure of an obscene character, shall be fined": Pages 512, 513.

In 1879, the scope of section 4 was extended, and the section amended to read as follows: "Every person who shall sell, or lend, or introduce into any family, . . . . any obscene, lewd, or lascivious book, pamphlet, paper, . . . . or other publication of an indecent nature, . . . . shall be fined": Pub. Acts 1879, p. 428. In 1885 the scope of section 3 was extended for the purpose of covering "obscene and immoral publications," by the repeal of the section and the substitution of the following:

"Section 1. Every person who shall buy, sell, . . . . or have in his possession with intent to sell, any obscene or indecent book, pamphlet, paper, . . . . shall be punished by a fine. . . . .

"Sec. 2. Every person who shall sell . . . . any book, magazine, pamphlet, or paper devoted wholly or principally to the publication of criminal news, or pictures and stories of deeds of bloodshed, lust or crime, shall be fined": Pub. Acts 1885, p. 433.

It is evident that this enlargement of section 3 was believed to cover the evil of introducing indecent literature into families, etc., which was punished by section 4 as amended in 1879; for this provision was dropped (without any prior repeal) in the Revision of 1888. It is also evident that the legislature here declares the dissemination of <sup>26</sup> publications of the kind specified to be dangerous to public morals, and that the designated publications are in fact such as deal with information of acts and conduct which are wicked and in violation of moral obligations, like lawless deeds of bloodshed, lustful or lascivious conduct, crimes or offenses involving similar immorality, and with matters of that nature made attractive in the treatment by pictures and by stories. The phrase "criminal news" is used in its wide signification of information of wicked and immoral acts of recent occurrence or discovery. The legislature in effect declares the concentration of items of this nature for circulation in publications devoted wholly or mainly to their collection, to be of immoral tendency, calculated to induce, especially among the young, the immoralities they are thus incited to dwell upon, and so to endanger the public morals. It is impossible to say that this declaration is without reason, or that such publications do not tend to public demoralization as truly as descriptions of mere obscenity. The statute therefore seeks to protect the public from this danger by punishing the selling and other dissemination of the designated publications.

In the Revision of 1888, section 1537 re-enacts the provisions against obscene publications contained in section 3 of the Revi-

sion of 1875, as enlarged by section 1 of the act of 1885, and section 1538, like section 2 of the act of 1885, punishes the spread of the specified immoral publications, thereby covering the evil of their introduction into families, schools, etc., so effectually as to induce the omission from the Revision of 1888 of section 4 of the Revision of 1875 as amended in 1879. Section 1538 does not differ from section 2 of the act of 1885, except in punctuation, and we do not think that difference alters the meaning.

In 1895 the various sections of the Revision of 1888 directed against the publication of obscene and immoral literature were amended and grouped in "An act relating to obscene literature": Pub. Acts 1895, p. 558. The principal alterations relate to punishment. Section 1538, as thus amended, reads: "Every person who shall sell . . . any book, magazine, pamphlet, or paper, devoted to the <sup>27</sup> publication, or principally made up of criminal news, police reports, or pictures and stories of deeds of bloodshed, lust, or crime," shall be punished. The offense here described is essentially the same as that described in section 2 of the act of 1885. It may be committed in different ways. One way—which is the offense charged in the information—is by selling, or having in possession with intent to sell, a newspaper mainly devoted to detailing recent violations of moral obligations through acts of lawless violence, through conduct induced by lust, through crime; to illustrating such conduct by pictures; to revealing such conduct by stories. It is immaterial whether the paper is devoted to setting forth such immoralities in one or more of the manifestations last above indicated; in either case the offense is committed. The radical difference between the demoralizing effect of facts stated only as incident to the legitimate purposes of science or literature, and the same facts separated from their surroundings and massed for attractive presentation so as to fill the mind of the reader only with the immoralities they suggest, is too patent to need comment. The gist of the offense consists in disseminating by means of the newspaper, which finds its way into families, reaching the young as well as the mature, a selection of immoralities so treated as to excite attention and interest sufficient to command circulation for a paper devoted mainly to the collection of such matters.

We cannot say that the act of 1895, in so far as it defines and punishes this offense, is void; and very clearly it does not violate any constitutional provision relating to the freedom of the press.



"Article First" of our constitution contains a statement of certain "essential principles of liberty and free government," which constitute an underlying condition on which the delegation of power to the several governmental agencies is made, and so operate as limitations on the exercise of the sovereign power granted in broad terms to the legislative as well as to the executive and judicial departments: *State v. Conlon*, 65 Conn. 478, 489, 48 Am. St. Rep. 227, 33 Atl. 518; *Norwalk St. Ry. Co.'s Appeal*, 69 Conn. 576, 589, 38 Atl. 708. Among these, the most important and vital <sup>28</sup> are the right to participate in the exercise of political power, and the right to the free exercise and enjoyment of religious profession and worship, as declared in the first four sections of the article. A corollary to these rights is the right to the free expression of opinion on public measures and men, and on religious tenets and controversy. This corollary is expressly declared in the following two sections of the article, viz.:

"Sec. 5. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

"Sec. 6. No law shall ever be passed to restrain the liberty of speech or of the press."

The primary meaning of "liberty of the press," as understood at the time our early constitutions were framed, was freedom from any censorship of the press; from "all such previous restraints upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots toward enlightening their fellow-subjects upon their rights and the duties of rulers": *Commonwealth v. Blanding*, 3 Pick. 304, 313, 15 Am. Dec. 214. But this fundamental guaranty goes further: it recognizes the free expression of opinion on matters of church or state as essential to the successful operation of free government, and it also recognizes the free expression of opinion on any subject as essential to a condition of civil liberty. The right to discuss public matters stands in part on the necessity of that right to the operation of a government by the people; but, with this exception, the right of every citizen to freely express his sentiments on all subjects stands on the broad principle which supports the equal right of all to exercise gifts of property and faculty in any pursuit in life—in other words, upon the essential principles of civil liberty as recognized by our constitution. Every citizen has an equal right to use his mental endowments, as well

as his property, in any harmless occupation or manner; but he has no right to use them so as to injure his fellow-citizens or to endanger the vital interests of society. Immunity in the mischievous use is as inconsistent with civil liberty as prohibition of the harmless use. Both arise from the equal right of all to protection of law in the enjoyment of individual freedom of action,<sup>29</sup> which is the ultimate fundamental principle. This truth is plainly expressed in the language of section 3 and of section 5. The liberty protected is not the right to perpetrate acts of licentiousness, or any act inconsistent with the peace or safety of the state. Freedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of other action includes an injurious use of one's occupation, business, or property. In truth, freedom of speech and press, like freedom of other action, is necessarily protected by the first four sections of the article; and sections 5 and 6 are not essential for that purpose, except so far as they erect an arbitrary bar to any form of censorship of the press.

The general right to disseminate opinions on all subjects was probably specified mainly to emphasize the strong necessity to a free government of criticism of public men and measures. But it is specified as one of the conditions of civil liberty, and, like other conditions of a similar nature, it necessarily involves the protection of those who may suffer from the wrongful exercise of any common right. The idea of immunity from molestation for the harmful use of opinion was perhaps not undreamed of in the convention of 1818, but it certainly was held to be inconsistent with true freedom. It may be significant of the views of the framers of our constitution that a section of article first contained in its first draft, which prohibited the molestation of any person for his opinions on any subject whatever, was under the consideration of the convention during most of its session and was finally rejected without dissent: *Journal of the Constitutional Convention of Connecticut, 18, 75, 55.*

The notion that the broad guaranty of the common right to free speech and free thought, contained in our constitution, is intended to erect a bulwark or supply a place of refuge in behalf of the violators of laws enacted for the protection of society from the contagion of moral diseases, belittles the conception of constitutional safeguards and implies ignorance of the essentials of civil liberty.

The act of 1895 is valid in so far as it punishes the offense of which the accused was convicted. It is not necessary to<sup>30</sup> con-

sider other provisions of the act. Portions of a statute may be valid, although other portions may be unconstitutional: *State v. Wheeler*, 25 Conn. 290, 299. We say nothing as to the policy of such legislation; the only question before us is the one of validity. Legislation may or may not be adapted to accomplish a valid and beneficial purpose, and its utility or futility is for the consideration of the legislature. Somewhat similar statutes have been enacted in other states, and their validity has been sustained on the general lines we have indicated, although our attention has not been called to any case precisely analogous: *State v. Van Wye*, 136 Mo. 227, 234, 58 Am. St. Rep. 627, 37 S. W. 938; *In re Banks*, 56 Kan. 243, 42 Pac. 693; *United States v. Harmon*, 45 Fed. 414, 416; *In re Rapier*, 143 U. S. 110, 134, 12 Sup. Ct. Rep. 374.

It was competent for the state's attorney to charge the offense in the words of the statute: *State v. Carpenter*, 60 Conn. 97, 106, 22 Atl. 497; *State v. Costello*, 62 Conn. 128, 131, 25 Atl. 477; *Strohm v. People*, 160 Ill. 582, 584, 43 N. E. 622.

The errors alleged in denying the requests to charge are sufficiently considered in the discussion of the charge as given. To a large extent the requests were so framed that the court properly refused to incorporate them in the charge. It is not for counsel to frame the charge of the court.

The first passage in the charge to which objection is made is not open to the error assigned. The court correctly charged that the statute, in so far as it created the offense for which the defendant was prosecuted, is a constitutional and valid law. But it did err in telling the jury that they were judges of its constitutionality. The validity of a statute is a question of law to be settled by the court, and the jury are bound to accept the opinion of the court as the law for the case: *State v. Main*, 69 Conn. 123, 132, 61 Am. St. Rep. 30, 37 Atl. 80.

The second passage objected to could hardly have injured the defendant. It relates to the interpretation of the language of the statute, viz.: "Criminal news, police reports, or pictures and stories of deeds of bloodshed, lust, or crime." As we have seen, this language means wicked and immoral acts and conduct set forth in the form of news; that is, accounts of events of that nature, or in the form of statements <sup>31</sup> of or articles concerning the doings of the police in the detection and prosecution of offenses of that nature; or in the form of pictures, as well as stories, of matters of that nature—i. e., deeds of blood-



shed, of lust, or of crime which is a violation of law involving wicked and immoral acts and conduct. This language designates one class of matter—i. e., wicked and immoral conduct as manifested in one or more of the forms specified: *Strohm v. People*, 160 Ill. 586, 43 N. E. 622.

The third passage objected to contains material error. The gist of the statutory offense is the massing of these immoralities in one publication for circulation, and demands that the paper shall be mainly or principally devoted to the publication of such material. The law cannot be evaded by intermingling other material, whether for the purpose of evasion or of securing attention to the main subject matter, so long as the principal resulting effect is the circulation of this massed immorality; but that main result must appear, or the offense is not committed. The offense does not depend on the motive; it is immaterial whether the motive is the gain to be derived from the circulation, the advertising, or the involuntary contributions of those desirous of escaping publicity, or is simply the gratification of a malicious disposition, or is a genuine conviction of the reforming efficiency of a portrayal of all manifestations of crime and immorality; but the offense does depend upon the devotion or dedication of the columns of the paper mainly to the publication of the matters designated by the statute. The charge, therefore, in stating that the offense may be committed whenever the objectionable matter is a leading feature of the paper or when special attention is devoted to the publication of the prohibited items fails to state the full meaning of the statute. It may be doubtful whether such an imperfect statement in this case in fact injured the defendant, but it is possible that it did.

The court properly left to the jury the determination, as a question of fact, whether the papers in evidence were thus devoted to the publication of material claimed to be within the statutory description.

<sup>32</sup> The charge on the question of agency is hardly as full as it should be, in view of the evidence and claims. The papers were sold at the defendant's shop in his absence; if sold by one acting under the express or implied authority of the defendant to make that sale, the charge that the defendant sold is proved. There is a distinction between a civil and a criminal case in respect to the effect on the responsibility of the master, of a mere general authority given to a servant. In a criminal case the authority must cover the specific act complained of.

In statutory offenses consisting in the sale of articles in violation of regulations for securing public order, the authority to a servant to sell the particular article charged as sold by the master may, without proof of any specific authority, be inferred from various circumstances—such as the relation of shopkeeper and selling clerk, coupled with proof that the article sold was placed by the master in the shop among other things that were to be sold; carelessness or negligence of the master in providing or keeping the articles sold, and other evidence that legally tends to prove that the sale was made with the knowledge or consent of the master; provided, such evidence does in fact satisfy the jury beyond a reasonable doubt that the servant in selling the article acted in pursuance of authority from the master: *State v. Curtiss*, 69 Conn. 86, 89, 36 Atl. 1014; *Commonwealth v. Stevens*, 153 Mass. 421, 25 Am. St. Rep. 647, 26 N. E. 992.

In the fourth passage objected to, the court seems to instruct the jury to determine, as a matter of fact, without aid from the court, whether the publications in evidence are such as the statute describes. The question whether the defendant sold a paper devoted to the publication of matters described in the statute was properly submitted to the jury as one of fact. But if the fact of the sale and the fact that the paper sold was devoted to the publication of a class of matter therein contained, were uncontested or admitted, then the question whether that class of matter comes within the statutory definition may be treated by the court as one of law. So where all the elements are contested, the court, in submitting the whole question to the jury as one of fact, may instruct them as to the principles by which they should be <sup>33</sup> guided in determining the application of the statute to the publication, and may express its opinion that the printed matter in evidence is or is not such as the statute designates: *Haight v. Cornell*, 15 Conn. 74, 83; *Donaghue v. Gaffy*, 54 Conn. 257, 266, 7 Atl. 552; *Rosen v. United States*, 161 U. S. 29, 42, 16 Sup. Ct. Rep. 434.

The court did not err in admitting the several exhibits; they are before us and it is clear that they tend to prove the allegations of the charge. The whole paper alleged to be sold in violation of the act must go to the jury. It is proper for the state's attorney to designate the articles he claims to be within the statutory definition; and this was done.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

**Liberty of the Press.**—A statute may, without violating the constitutional guaranty of freedom of speech or liberty of the press, make it a felony for one to engage in editing, publishing, or disseminating a paper devoted mainly to the publication of scandals, immoral conduct, and immoral assignations: See the monographic note to *Booth v. People*, 78 Am. St. Rep. 260, on the power of legislatures to declare acts criminal.

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### ALLEN v. ALLEN.

[73 Conn. 54, 46 Atl. 242.]

**MARRIAGE AND DIVORCE—VESTED RIGHT TO DIVORCE.**—The right to a divorce is not a vested right.

**MARRIAGE AND DIVORCE—REFORMATION OF DEFENDANT PENDENTE LITE.**—Conditions justifying divorce must be found to exist at the very time when the divorce is granted. Hence evidence of the temperate habits or condition of defendant subsequent to the commencement of an action for divorce on the ground of habitual intemperance is admissible to destroy plaintiff's right to divorce.

Complaint for divorce on the ground of habitual intemperance. Upon the trial the court admitted evidence of the temperate habits of the defendant subsequent to the commencement of the action and up to the time of trial and dismissed the complaint. Plaintiff appealed.

C. A. Safford and A. Perkins, for the appellant.

A. C. Bill, J. P. Tuttle, and J. P. Goodhart, for the appellee.

**55 ANDREWS, C. J.** Marriage is that ceremony or process by which the relationship of husband and wife is constituted. The consent of the parties is everywhere deemed an essential condition to the forming of this relation. To this extent it is a contract. But when the relation is constituted, then all its incidents, as well as the rights and duties of the parties resulting from the relation, are absolutely fixed by law. Hence, after a marriage is entered into the relation becomes a status, and is no longer one resting merely on contract. It is the relation fixed by law in which the married parties stand to each other, toward all other persons and to the state. It continues as long as the parties both live and is one from which they cannot separate themselves by their own agreement, or by their own misconduct. This status can only be dissolved by the assent of the state, which is ordinarily indicated by the judgment of a



competent court. When an attempt is made through the courts to undo a marriage, the state becomes in a sense a party to the proceedings, not necessarily to oppose, but to make sure that the attempt will not prevail without sufficient and lawful cause shown by the real facts of the case, nor unless those conditions are found to exist at the time the decree is made upon which the state permits a divorce to be granted. The state has an interest in the maintenance of the marriage tie which neither the collusion nor the negligence of the parties can impair: *Dennis v. Dennis*, 68 Conn. 186, 57 Am. St. Rep. 95, 36 Atl. 34; *Gould v. Gould*, 2 Aiken, 180; Opinion of the Judges, 16 Me. 480; *Whittington v. Whittington*, 19 N. C. 64; *Hall v. Hall*, 3 Swab. & T. 347, 349.

There can be no such thing as a "legal right" to a divorce <sup>56</sup> vested in any married person. "The state does not favor divorce; and only permits a divorce to be granted when those conditions are found to exist, in respect to one or the other of the married parties, which seem to the legislature to make it probable that the interests of society will be better served and that the parties will be the happier, and so the better citizens, separate, than if compelled to remain together. The state allows divorces, not as a punishment to the offending party, nor as a favor to the innocent party, but because the state believes its own prosperity will thereby be promoted." Obviously this condition must be found to exist at the very time when the divorce is granted, otherwise the divorce should be refused. And to this end "all courts possessing divorce jurisdiction are vested with a discretion. A wise discretion should always be exercised in administering the law of divorce, lest its spirit be disobeyed by a too narrow adherence to its letter": *Dennis v. Dennis*, 68 Conn. 186, 57 Am. St. Rep. 95, 36 Atl. 34.

There is no error in either of the cases.

In this opinion the other judges concurred.

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#### OF THE LOSS OF THE RIGHT TO A DIVORCE AFTER IT HAS ONCE BEEN PERFECTED.

We confess that the decision in the principal case is a surprise to us. Equally surprising is the fact that no other case was cited in the opinion of the court, nor has any been revealed by our search, considering and determining precisely the same question. We may readily agree to the premises assumed by the court, namely, that the state may be regarded as interested in, and even

as a party to, proceedings for divorce, and that there can be no legal right to a divorce which is protected by the constitution against legislative impairment, without at all assenting to the conclusion here reached, for the question before the court was not constitutional, but involved only the interpretation of a statute designating habitual intemperance as a cause for divorce. We do not believe it is true, as implied in the opinion, that courts have a discretion to deny a divorce where the defendant has given cause therefor as specified in the statute of the state, in cases where the complainant has not voluntarily waived this right, or lost it by his misconduct. Doubtless, as stated in *Dennis v. Dennis*, 68 Conn. 197, 57 Am. St. Rep. 95, 36 Atl. 34: "The forms of the law of divorce should never be allowed to minister to the caprices of fickle-minded persons, or to the revenges of the disappointed or vindictive, and least of all to the passions of the incontinent. Nor under any circumstances should they be used in fraud of the statute allowing divorces, nor of the court. To the end that any and all attempts to use the forms of the law of divorce for any of the purposes indicated shall be discovered and defeated, all courts possessing divorce jurisdiction are vested with a discretion." This does not affirm, however, that the court is vested with a discretion to deny divorces where **no fraud on the state** or the court is attempted, and the cause therefor had become **perfect** before the institution of the suit, and had not been afterward destroyed by condonation or some other cause due to the act or consent of the complaining party.

In many of the states a divorce may be granted because of desertion or for failure to provide. May the defendant, after giving cause for divorce, reform, pendente lite, or otherwise, whenever suit is brought, and thus defeat its object, and if so, how often may he do this? We do not doubt that condonation may destroy the right to divorce, whether before or after suit brought, because it "is the remission by one of the married parties of an offense which he knows the other has committed against the marriage, . . . a blotting out of the offense imputed so as to restore the offending party to the same position he or she occupied before the offense was committed": *Youngs v. Youngs*, 130 Ill. 230, 17 Am. St. Rep. 313, 32 N. E. 806; *Shackleton v. Shackleton*, 48 N. J. Eq. 364, 27 Am. St. Rep. 478, 21 Atl. 935.

So, though the right to a divorce has become complete, it may be destroyed either prior or subsequent to the commencement of the suit thereon by such conduct of the complaining party as amounts to an offense against the marital obligation, entitling the other party to a divorce, as where one entitled to a divorce because of the adultery or desertion of his spouse afterward, whether before or after the commencement of the suit, is himself guilty of adultery: *Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717;

*Whippen v. Whippen*, 147 Mass. 294, 17 N. E. 644; *Smith v. Smith*, 4 Paige, 432, 27 Am. Dec. 75; *Christianberry v. Christianberry*, 3 Blackf. 202, 25 Am. Dec. 96; *Hale v. Hale*, 47 Tex. 336, 26 Am. Rep. 294.

The vice of the principal case is, that it allows an equivalent of a condonation to be effected *pendente lite* by the act of the party in fault and against the will of the party who has been wronged. We see no reason why, when a cause of action on the ground of habitual intemperance has become perfect, it should be regarded as affected by the subsequent conduct of the guilty party, except where the marital relations continued, and condonation must be presumed therefrom. Of course, as already stated, the question is one of statutory construction only and as the statute might have omitted habitual intemperance from the grounds of divorce, so it may, on authorizing the grant on that ground, require the continuance of such intemperance up to the period named therein. Thus, if the statute specifies habitual intemperance "for the space of one year immediately preceding the filing of the complaint," the right to a divorce is lost by the failure to file such complaint before habitual intemperance ceases to exist: *Reynolds v. Reynolds*, 44 Minn. 132, 46 N. W. 236. The statute of Connecticut, however, does not declare that the habitual intemperance should continue either to the filing of the complaint or the granting of a decree thereon. Therefore, as applied to such a statute, we cannot approve the doctrine of the principal case, but rather prefer the dictum in *Moore v. Moore*, 41 Mo. App. 176, that "if we could state a case where a husband should be shown to have been an habitual drunkard for just one year and no more, the offense would be distinct and complete, and though it then cease, the wife could maintain an action for a divorce; but if she voluntarily continued the marital relation after the offense was complete, she would condone or forgive the offense, and nullify her right to a divorce. If, however, the husband continues to be an habitual drunkard, the offense is continuous, and the wife may break off from him at any time, and establish her right to a divorce."

If a statute declares that divorce may be granted for desertion for a time specified, there seems to be no dissent from the proposition that desertion continued for such period creates a perfect right to a divorce which it is beyond the power of the party in the wrong to destroy without the consent of the other. Hence, an offer to discontinue the desertion and return to and live with the deserted spouse, though made in good faith and before the institution of any suit for divorce, cannot, unless accepted, constitute any defense to such suit: *Benkert v. Benkert*, 32 Cal. 468; *Fishli v. Fishli*, 2 Litt. 337; *Cargill v. Cargill*, 1 Swab. & T. 235; *Brookes v. Brookes*, 1 Swab. & T. 326; *Basing v. Basing*, 3 Swab.



& T. 516; *Hesler v. Hesler*, Wright, 210; *Murray v. McLauchlin*, 1 Ses. Cas. S. 294; *Muir v. Muir*, 6 Ses. Cas. S. 1353. We see no reason why the principle of these cases should not apply in every other case of the existence of a sufficient cause for a divorce, and we believe the true rule to be, that, in the absence of clear language in the statute to the contrary, the right of divorce once perfected is not terminated, except by condonation or forgiveness granted by the party wronged, or by his committing such an offense against his marital duties and obligations as may be successfully pleaded by way of recrimination.

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### CHAPIN v. COOKE.

[73 Conn. 72, 46 Atl. 282.]

#### WILLS—CONDITIONS IN RESTRAINT OF MARRIAGE.

▲ bequest or devise in restraint of a second marriage is valid.

#### WILLS—CONDITIONS IN RESTRAINT OF MARRIAGE.

If a condition in a will in restraint of marriage is annexed to a legacy as a condition subsequent, the condition is valid if there is an express immediate gift over, and void if there is no such gift.

#### WILLS—CONDITIONS IN RESTRAINT OF MARRIAGE.

If a testator directs the sale of all of his estate by will and the payment of one-half of the income to his widow during her life, or until she shall remarry, in lieu of dower, and the payment of the other half to certain relatives in specified proportions, and then provides that "on the death of my wife" the property is to be divided among said relatives, the interest of the widow in the estate, as well as in the trust created solely in her behalf, ceases upon her remarriage, and thereupon the legatees who take vested remainders in the shares given to them become entitled to a division of the entire estate.

W. W. Hyde, for the plaintiff.

W. H. Clark and W. A. Arnold, for Ella E. Hawes, contestant.

<sup>74</sup> HAMERSLEY, J. Contracts will not be enforced which are contrary to sound public policy. The courts have considered contracts totally restraining one from marriage, or from marrying any but a particular person without imposing an obligation to marry that person, to be of this nature: 1 Swift's Digest, 212. In such case the mere abstinence from marriage is not unlawful, but the compulsion to celibacy is impolitic; and so neither party to an attempt at such compulsion can invoke the aid of a court of justice in the enforcement of an obligation involving a violation of its own maxims of sound public policy.

But this rule of the law of contract did not at common law limit the freedom of one in making a gift of his own property. <sup>75</sup> A gift, in pursuance of the general law regulating the transfer of property, to a person while he remained unmarried, was lawful, and was not treated as a compulsory obligation in total restraint of marriage. The donee retained his freedom of choice, and the donor had no power of compulsion. The donee had no interest in the thing given, beyond that derived from the donor's bounty as expressed in the terms of the gift; he assumed no obligation to remain unmarried, but, on the other hand, he acquired no right of protection in the possession of property to which he had no moral or legal claim, unless he chose to comply with the condition. Such a gift did not require the aid of a court to enforce an obligation to remain single; it needed only a recognition of the limitations of a mere benefaction. Possibly a case might happen where the question would arise whether the transaction were really a gift or a contract; but if it were plainly a gift the rights of the donee, both legal and moral, were limited by its terms.

So a gift of land on condition the donee shall not marry was valid, unless the condition were repugnant to the estate granted, as in the case of an estate tail: 1 Cruise's Digest, tit. 13, c. 1, sec. 3. The same rule prevailed in case of a gift by devise. In stating this law Mr. Cruise adds: "Conditions in restraint of marriage are . . . so far discouraged by the English law, that they are construed strictly in favor of the person on whom such restraints are laid": 1 Cruise's Digest, tit. 13, c. 1, 48, 55. This last expression must be taken in connection with the nature of the restraint; for any condition that is plainly harsh, unjust and unwise, would invite a strict construction in favor of him on whom it is laid. This state of the English common law, and distinction between contracts and gifts in restraint of marriage, is affirmed in *Phillips v. Medbury*, 7 Conn. 568, 573.

The civil law, which largely influenced the canon law of England, was different. The general rule was that a condition, whether precedent or subsequent, in restraint of marriage, attached to a gift by devise, was void; and a devise of real or personal estate upon such condition would take <sup>76</sup> effect free from the condition. Such condition was held to be unlawful, and "what is unlawful to be done, the law will have us to understand as impossible to be done," and a legatee cannot be held to perform an "impossible condition." But a "possible condition," which is not void in law, whatever it may be, "is to be

observed as a law by him on whom it is enjoined, or otherwise take its due effect": Godolphin's Orphans' Legacy, 44, 45, 291. The rule of the common law as to gifts (including devises of land) made upon conditions in restraint of marriage, was reasonably clear; so was the rule stated by Dr. Godolphin in 1676 as the rule of the canon law. Devises of land were within the jurisdiction of the common-law courts; gifts of personal estate were within the jurisdiction of the ecclesiastical courts, in which the canon law was authority. The court of chancery had a concurrent jurisdiction in respect to dispositions of both kinds. The court of chancery, as well as the common-law courts, administered substantive law in accordance with the principles of the common law of England, and were jealous, perhaps unduly, of the encroachments of the civil law. Naturally, in the effort of chancery to administer the common law without wholly disregarding the canon law, and to find some common ground applicable to cases the jurisdiction of which was concurrent with the ecclesiastical courts, as well as to cases the jurisdiction of which was concurrent with the common-law courts, exceeding confusion and diversity of opinion arose. The controversy centered in cases where devises or bequests ("devise" and "bequest" were then often used promiscuously) were on condition the recipient married with consent of a person named—a condition valid by the common law, void by the canon law. The differences are illustrated in the language of the master of rolls in 1731 (*Peyton v. Bury*, 2 P. Wms. 626, 628), Lord Hardwicke in 1743 (*Pulling v. Reddy*, 1 Wils. 21), Chief Justice Willes in 1738 (*Hervey v. Aston*, Willes, 83, 93), Lord Mansfield in 1767 (*Long v. Dennis*, 4 Burr. 2050, 2055), Ashhurst, J., in 1786 (*Doe v. Freeman*, 1 Term Rep. 389), and in many other cases. In 1788 Lord Thurlow said: "The early cases refer in general to the canon law, <sup>77</sup> as the rule by which all legacies are to be governed. Toward the latter of the last and beginning of the present century, the matter is more loosely handled; the canon law is not referred to, as affording too positive a rule, but these conditions are treated as partaking of the force allowed them by the law of England, but at the same time as unfavorable to the good order of society; at length it became a common practice that such conditions were only in *terrorem*. I do not find it was ever seriously supposed to be a testator's intention to hold out the terror of that which he never means to happen; but the court has made such conditions amount to no more." And further: "About



the middle of the present century, doubts arose which divided the opinions of the first men of the age. The difficulty seems to have been in reconciling the cases. The prevailing opinion was, that devises of land should follow the rules of the common law, and legacies of money the rules of the canon law. The question remains unresolved, what is the nature and extent of the rule. . . . It is agreed on all hands that (however restrictive of marriage) when the legacy is given over to other uses, the testator shall be deemed to regard those uses": *Scott v. Tyler*, 2 Brown Ch. 431, 487, 488.

The question of the nature and extent of the rule still remains unresolved. On this point there is still no controlling consensus of opinion; and there is not likely to be until the cases of generally admitted authority are treated upon some principle consistent with truth and self-respect. Mr. Cox, in his note to *Peyton v. Bury*, 2 P. Wms. 626, published in 1790, says: "The general rule in regard to personal legacies seems to be that the conditions in restraint of marriage, whether precedent or subsequent, shall be void, unless there be a devise over, in which case the right of the devise over shall prevail; but interests arising out of land shall be governed by the rules of the common law in respect to conditions." It is patent that if a condition, whether precedent or subsequent, is unlawful, its unlawful character cannot properly be changed by any further disposition of the thing given in case of forfeiture. The statement of Mr. Cox is practically <sup>78</sup> a different form of putting the rule in *terrorem* commented on by Lord Thurlow. In discussing the application of that rule in *Hervey v. Aston*, Willes, 83, Lord Chief Justice Willes says: "I would endeavor to make this rule a reasonable and intelligible rule if possible; and I think it can be made so in no other way than by considering a devise over as evidence of the intent of the testator, without determining that this intent cannot be expressed in any other way. When, therefore, it is said that the devise is only in *terrorem*, it is laid down, not as a rule of equity that these devises can be only in *terrorem*, but that if there be no devise over it shall be taken that the testator intended it to be only in *terrorem*, and so is only an evidence of his intention, but when he expresses his intention to be otherwise, it would be absurd to say that he intended it to be in *terrorem*." *Hervey v. Aston*, Willes, 83, was one of the most thoroughly argued and carefully considered of this class of cases. It seems to have influenced Lord Thurlow in his treatment of the same subject

in *Scott v. Tyler*, 2 Brown Ch. 431, 487, 488. It was heard by the lord chancellor, assisted by Lee, lord chief justice of the king's bench, Willes, lord chief justice of the common pleas, and Sir J. Comyns, chief baron of the exchequer, receiving the unanimous assent of the chief of the court of chancery and of each of the common-law courts.

In this state we have had no occasion to consider, for the purpose of deciding any case, the principles which should be our guide in applying these cases of commonly admitted authority. It is not necessary to do so in the present case, and we do not mean to imply an opinion on that subject. We have considered the origin and treatment of the rule claimed in behalf of the widow only so far as it seemed appropriate to show that the rule cannot affect the principle on which we decide this case.

For the purposes of this decision, we may assume the general rule to be as claimed: That when a condition in restraint of marriage is annexed to a legacy as a condition subsequent, the condition is valid if there is an express immediate gift over, and is void if there is no such gift over. We may also assume that the gift in question is one of personal property, <sup>79</sup> that the will expresses a condition subsequent rather than a limitation, and that there is no express gift over. Assuming this, we think it clear that the interest of the widow in the bequest to her ceased upon her marriage. This result follows from the settled doctrine that the general rule relied on has no application to second marriages. It is true that dicta appear in several cases intimating a contrary view, and they seem to have influenced Judge Reeve to some extent in a brief reference to this subject in his work on Domestic Relations, page 222, and also Judge Swift (1 Swift's Digest, s. p. 141), in a passage based on the dictum of Ashhurst, J., in *Doe v. Freeman*, 1 Term Rep. 389, a dictum uncalled for by the point decided. The passage in Swift was urged upon this court in *Phillips v. Medbury*, 7 Conn. 568, and rejected. Notwithstanding such occasional unguarded expressions, and an apparent conflict between some American cases, we think the doctrine is settled in England and in this state by the authority of adjudged cases, and that these cases rest upon solid reason.

The general rule arose from an effort of the court of chancery to reconcile the differences between the canon law and the common law, in cases where the two systems clashed. It was a device of the opportunist, which should not be extended beyond the necessity of the occasion. It was not intended for and nev-

er was applied to cases where the two systems were in harmony. At common law, when uninfluenced by the doctrines of the canon law, any gift, whether of personalty or real estate, could be limited by a condition in restraint of marriage, whether of a first or second marriage. There was no question of legality, but only of intent. The condition was valid, whether it restrained an unmarried daughter from any marriage without consent of others, or a widow from a second marriage.

So far as second marriages were concerned, the canon law was in entire harmony with the common law. "Although a condition directly contrary to marriage, annexed to a legacy in a will, is a void condition for that very reason, yet the civil, or rather the canon, law doth distinguish in this point between a virgin and a widow, and says that such conditions <sup>so</sup> against marriage (as to a virgin) are void; but allows them as to widows." And the rule in respect to females holds the same in reference to males: Godolphin's Orphans' Legacy, 382. A condition in restraint of a second marriage was therefore equally valid by the common law and canon law. No device was necessary to assimilate the two systems. The freedom of a testator's bounty—whether its subject was land or chattels—was in this respect unhampered by either.

It is impossible to justify the application of an arbitrary rule which determines a testator's intent without reference to his actual intention plainly appearing in the will, which was admittedly adopted for the purpose of giving some practical effect to the canon law in cases where it differed from the common law, to those cases where both common and canon law are at one in putting no restraint on the freedom of the testator's bounty. And so are the adjudged cases. The lawfulness of a condition that a widow shall not marry, or of an annuity during widowhood, is broadly stated by Lord Thurlow in *Scott v. Tyler*, 2 Bro. Ch. 431. In 1876 the English court of appeal affirmed the principle laid down by Lord Thurlow, in the strongest terms: *Allen v. Jackson*, L. R. 1 Ch. 399. In the opinions of the judges it is stated that a condition in restraint of a second marriage is valid, whether the gift be by a husband or a stranger, whether made to a husband or a wife; that there is no rule of public policy against limiting gifts to a widow or a widower until a second marriage takes place; that it never has been decided that the general rule in respect to conditions in restraint of marriage, attached to legacies, applies to second marriages; and the court holds that the rule cannot be so applied.



In *Smith v. Gates*, 2 Root, 532, 535, 1 Am. Dec. 89, and in *Griggs v. Dodge*, 2 Day, 28, 2 Am. Dec. 82, the lawfulness of the limitation of gifts by restraint on second marriages is referred to, seemingly with approval, but the question was not directly involved nor decided. In *Phillips v. Medbury*, 7 Conn. 568, the question was ably argued by counsel, and set at rest in a vigorous opinion delivered by Chief Justice Daggett. The court holds that <sup>81</sup> the doctrine declaring restraints upon marriages in wills void, as made in *terrorem*, does not apply to a widow. This case is affirmed in *Bennett v. Packer*, 70 Conn. 357, 360, 66 Am. St. Rep. 112, 39 Atl. 739. Here there was no devise over. The gift was of personal as well as of real estate. The general rule of strict construction, applicable to legacies in restraint of marriage, was expressly discarded, and it was held that the testator intended his gift to be during widowhood; that upon the subsequent marriage the estate of the widow was determined *ipso facto*, the land descending to the heirs and the personal property being intestate estate; that the gift being in lieu of dower, the widow was not entitled to dower, but that she was entitled to her distributive share of the intestate personal property: *Chappel v. Avery*, 6 Conn. 31; *Ingersol v. Knowlton*, 15 Conn. 468, 473; *Sheldon v. Rose*, 41 Conn. 371.

There is some diversity among American decisions on this question, but as our own law is so firmly settled there is no need of attempting an analysis of the cases. We incline to think the weight of authority is in accord with the law as settled in England and in this state: 2 *Jarman on Wills*, 564.

There remains the question of the disposition of the corpus upon the determination of the widow's estate; in this question the widow has no interest.

The will is very informal, and evidently was drawn by one unacquainted with the technical language of the law. It gives the residue of the estate to a trustee, and directs him to pay one-half the income to the testator's wife, and the other half to his brother and nieces (in the proportions specified) "during the lifetime of my wife, or until she should marry"; and further directs the trustee to divide the corpus, "on the death of my wife," between the same brother and nieces in a proportion differing somewhat from that governing their enjoyment of the income; the difference arising from adding to the share given to the brother and nieces, respectively, in the proportion indicated by their enjoyment of the income, one-third each of the

one-half of the corpus burdened by the widow's interest. The intention seems entirely clear, that the distribution of the income by the trustee, both <sup>82</sup> to the blood relatives and to the wife, should continue for the same period, that is, until the death or prior marriage of the wife; in other words, until the interest of the wife in one-half the income should be terminated either by death or marriage; and that then the whole estate should be divided between the brother and nieces. There is indicated no possible reason for the trust except to charge the whole estate with the payment of the wife's annuity during its continuance; when the annuity ceases the sole purpose of the trust ceases, and the direction to the trustee to divide the estate between the brother and nieces takes effect. This intention cannot be defeated because the testator, in referring to the determination of the wife's estate says, "on the death of my wife," instead of repeating in full the language by which he had just before limited the duration of that estate. Even if the language were more doubtful we would be bound to give effect to an intention thus plainly inferable from the provisions of the will: *Mansfield v. Mix*, 71 Conn. 72, 77, 40 Atl. 915; *Kellogg v. Mix*, 37 Conn. 243, 247.

Upon the death of the testator the brother and nieces took a vested interest in the shares of the estate given to them respectively.

Questions as to the administration of the estate of the brother, now deceased, are improperly included in this complaint.

The superior court is advised that all interest of Mrs. Cooke, the widow of the testator, in the residue of the estate, was determined upon her marriage; and that the fund now in the hands of the administrator should be distributed as follows: One-half to Mrs. Charles Slocum, one-quarter to the estate of Stephen C. Cooke, and one-quarter to Mrs. Ella Cooke Porter.

In this opinion the other judges concurred.

**CONDITIONS IN RESTRAINT OF MARRIAGE.**

- I. General and Other Unreasonable Restraint.**
- II. Reasonable Conditions or Restraints.**
  - a. Conditions Against Marrying Specified Persons or Persons of a Specified Class.
  - b. Limitations Respecting Age.
  - c. Condition Requiring Donor's Consent to Marriage.
  - d. Provisions Intended for the Support of the Donee Only While Unmarried.
- III. Conditions Precedent and Subsequent, Distinctions Between.**
- IV. Conditions in Favor of Divorce or Separation.**
- V. Conditions Against Remarriage.**

**I. General and Other Unreasonable Restraint.**

The validity of conditions in restraint of marriage involves a number of distinctions upon which the courts are not entirely harmonious. It is well established, however, that a condition in restraint of marriage generally without limitation is void. Thus, "conditions annexed to gifts, legacies, and devises in restraint of marriage are not void, if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then, indeed, as a condition against public policy, and the due economy and morality of domestic life, it will be held to be utterly void. And so, if the condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to particular circumstances that the party upon whom it is to operate is unreasonably restrained in the choice of marriage, it will fall under the like consideration": *Little v. Birdwell*, 21 Tex. 597, 73 Am. Dec. 242, 248. Where a condition in restraint of a first marriage is sought to be imposed, there can be no question that a condition in general restraint of marriage which is imposed in order to cause the beneficiary to live unmarried is contrary to public policy and void: *Waters v. Tazewell*, 9 Md. 291; *Otis v. Prince*, 10 Gray, 581; *Mourning v. Missouri Coal etc. Co.*, 99 Mo. 320, 12 S. W. 884; *Denfield, Petitioner*, 156 Mass. 265, 30 N. E. 1018; *Hogan v. Curtin*, 88 N. Y. 171, 42 Am. Rep. 244. Thus, a condition that a legacy should cease if the legatee-testator's niece should cease to be a member of the Society of Friends was held void, there being no gift over, where extrinsic evidence showed that there were only three unmarried men of that denomination in that neighborhood, and that marriage outside of the society forfeited membership: *Maddox v. Maddox*, 11 Gratt. 804. If an estate is devised to a son and daughter in common, upon condition that should the daughter marry it should belong to the son in severalty, the condition is in general restraint of marriage, and void: *Williams v. Cowden*, 13 Mo. 211, 53 Am. Dec. 143. Or, if the condition



in a devise to the testator's sisters is that they are to remain sole, and that in case of either marrying, the property shall henceforth be enjoyed by the one remaining sole, the condition is null and void as placing a restraint upon marriage: *Smythe v. Smythe*, 90 Va. 638, 19 S. E. 175.

## II. Reasonable Conditions or Restraints.

Various conditions have been upheld on the ground that their object was not to prevent marriages, but merely to guard against haste or imprudence therein, or to subject a child or other object of the testator's bounty to the just restraint of parents or friends during infancy or for some other period.

a. **Conditions Against Marrying Specified Persons or Persons of a Specified Class.**—Restraints against marrying persons belonging to specified classes, or against marrying specified persons, have been upheld. Thus, a condition containing a prohibition to marry into the family of a person named is reasonable and valid, and "family" means one of the children of such person, the identity of whom may be established by parol evidence: *Phillips v. Ferguson*, 85 Va. 509, 17 Am. St. Rep. 78, 8 S. E. 241. A condition that the testator's son or daughter shall or shall not marry a particular person in order to inherit is valid, and not an unreasonable restraint upon marriage: *Tinlay v. King*, 3 Pet. 346; *Graydon v. Graydon*, 23 N. J. Eq. 229.

b. **Limitations Respecting Age.**—A devise or bequest with a condition that the devisee shall not marry until he or she arrives at the age of twenty-one years is lawful, and a violation of it with notice works a forfeiture of the estate devised or legacy bequeathed: *Shackelford v. Hall*, 19 Ill. 212; *Reuff v. Coleman*, 30 W. Va. 171, 3 S. E. 597. Perhaps a condition putting a limit upon the age at which the beneficiary may marry may be extended beyond twenty-one years, provided he or she is not prohibited from marrying within the period when the production of issue may be expected. Thus, in *Shackelford v. Hall*, 19 Ill. 215, it was said: "Nor is it our purpose at the present time to examine the subject as to what may in other cases be considered a reasonable prudential restraint upon imprudent marriages. An examination of the subject will show that the courts have very rarely held such condition void, although it might appear harsh, arbitrary, and unreasonable, so as it did not absolutely prohibit the marriage of the party within the period wherein issue of the marriage might be expected."

A peculiar case is that of *Soper v. Halsey*, 85 Hun, 465, 33 N. Y. Supp. 105, wherein it appeared that a condition in a will provided as follows: "And I further will and direct that my said son, Elmer, shall have a home on my farm where I now reside, during his natural life, if he shall so elect, and shall remain unmarried, but he shall have no right to bring a wife on said farm

to live, in case of his marriage"; and it was held that such son did not forfeit the provision of the will in his favor by living with a certain woman under an agreement with, but not under, such conditions as to create the marriage relation between them and constitute them husband and wife.

c. **Condition Requiring Donor's Consent to Marriage.**—A condition precedent requiring consent to marriage generally without limitation of age is good if there is a gift over: *Collier v. Slaughter*, 20 Ala. 263; *Gough v. Manning*, 26 Md. 347; and some cases hold that if there is no gift over, the condition must be considered in terrorem merely, and void: *Gough v. Manning*, 26 Md. 347; *Shackelford v. Hall*, 19 Ill. 212; *Collier v. Slaughter*, 20 Ala. 263. However, a condition precedent in partial restraint of marriage, as not to marry under a certain age, or requiring consent to marriage if under a certain age, is valid though there is no gift over: *Phillips v. Ferguson*, 85 Va. 512, 17 Am. St. Rep. 78, 8 S. E. 241.

d. **Provisions Intended for Support of the Donee Only While Unmarried.**—If from the language of the whole will it appears that it was the intention of the testator to provide for a designated beneficiary as long as she remained single, but upon her marriage she expected her husband to support her, and for that reason alone limited the gift over, such limitation is undoubtedly valid, and not in restraint of marriage. Hence, a testator may provide that his unmarried daughter may hold the devise to her "for and during her natural life, unless she shall be married, in which case her life estate shall cease": *Mann v. Jackson*, 84 Me. 400, 30 Am. St. Rep. 358, 24 Atl. 886. To the same effect, *Courter v. Stagg*, 27 N. J. Eq. 305. Such a devise or bequest is merely a limitation as to the time of enjoyment, and therefore valid: *Hotz's Estate*, 38 Pa. St. 422, 80 Am. Dec. 490; *Bruch's Estate*, 185 Pa. St. 194, 39 Atl. 813. Upon this point it may be said that at one time the courts seemed disposed to make a distinction between a condition subsequent and a conditional limitation, and to hold that if the devise were to the beneficiary until the event of marriage, and then over, it would be void, but if it were to her as long as she remained unmarried, it would be valid. This distinction seems by modern authority to be repudiated, and where the intention of the testator is clearly to support the beneficiary until marriage, such intention is upheld, whether it tends to form a condition subsequent or a conditional limitation: *Bodwell v. Nutter*, 63 N. H. 446, 3 Atl. 421; *Morgan v. Morgan*, 41 N. J. Eq. 235, 3 Atl. 63; *Bruch's Estate*, 185 Pa. St. 194, 39 Atl. 813; *Mann v. Jackson*, 84 Me. 400, 30 Am. St. Rep. 358, 24 Atl. 886.

III. **Conditions Precedent and Subsequent, Distinctions Between.**—Where the condition in restraint of marriage is a condition precedent to the vesting of the estate it has been considered valid: *Phillips v. Ferguson*, 85 Va. 509, 17 Am. St. Rep. 78, 8 S. E. 241;

**Ransdell v. Boston**, 172 Ill. 439, 50 N. E. 111. The old rules of construction applied to conditions in restraint of marriage, some of which, as has been shown, have fallen into disuse, are fully and accurately stated in **Gough v. Manning**, 26 Md. 347, to have been that if real or personal estate is devised upon a condition precedent, coupled with a devise over upon breach of the condition the devise or bequest is good and the restraint effectual to defeat the estate. If the estate is real, a condition precedent in restraint of marriage is good whether there is a devise over or not, and whether the restraint is general or partial. If the estate is personal, a condition in general restraint of marriage is void without a limitation over, but with such limitation it is good. If a condition subsequent is in general restraint of marriage, with or without limitation over, it is void both as to personal and real estate. If in partial restraint of marriage, it is good with a limitation over, but without such limitation it is construed in *terrorem* and void.

**IV. Conditions in Favor of Divorce or Separation.**—A condition in a will which constitutes an inducement to married persons to obtain a divorce, or to live separate and apart from one another, is opposed to public policy and void, and the devise is operative to the same extent as though such condition had not been written in the will; **Hawke v. Euyard**, 30 Neb. 149, 27 Am. St. Rep. 391, 46 N. W. 422; **Conrad v. Long**, 33 Mich. 78. On the other hand, it has been held that if a husband and wife are living apart, and divorce proceedings are pending at the time of the execution of the will, a condition that certain property shall vest in the husband at the termination of a life estate if he shall have obtained a divorce from his wife, has been upheld as valid: **Ransdell v. Boston**, 172 Ill. 439, 50 N. E. 111; **Cooper v. Remsen**, 5 Johns. Ch. 459. So a condition in a will that each of the daughters of the testator shall receive a certain portion of the estate in the event of becoming a widow, or otherwise becoming lawfully separated from her husband, is not void as holding out an inducement for an unlawful separation of husband and wife, or in restraint of the marital relation, but is only a condition for the support of such wife in case the support of her husband falls from any cause and it is valid and lawful: **Born v. Horstmann**, 80 Cal. 452, 22 Pac. 169, 338; **Thayer v. Spear**, 58 Vt. 327, 2 Atl. 161.

**V. Conditions Against Remarriage.**—A gift, devise, or legacy to a widow while she shall continue unmarried or until she remarries is good and valid, without any limitation over, and the condition must be complied with. In such case the restriction is not treated as a condition subsequent divesting her estate upon default, but as a conditional limitation or a qualification determining the duration of her estate, so that the contingency upon which the devise or bequest depends, although there is no gift over, is good as a conditional limitation: **Coppage v. Alexander**, 2 B. Mon. 313,



38 Am. Dec. 153; *Phillips v. Medbury*, 7 Conn. 568; *Cornell v. Lovett*, 35 Pa. St. 100; *Hotz's Estate*, 38 Pa. St. 422, 80 Am. Dec. 490; *Hibbits v. Jack*, 97 Ind. 570, 49 Am. Rep. 478; *Pringle v. Dunkley*, 14 Smedes & M. 16, 53 Am. Dec. 110; *Little v. Birdwell*, 21 Tex. 597, 73 Am. Dec. 242. The rule above announced is so well established and universally adhered to that no attempt will be made to cite all of the cases sustaining it. The doctrine is maintained by the following late cases: *Helm v. Leggett*, 66 Ark. 23, 48 S. W. 675; *Bennett v. Packer*, 70 Conn. 357, 66 Am. St. Rep. 112, 39 Atl. 739; *Rose v. Hale*, 185 Ill. 378, 76 Am. St. Rep. 40, 56 S. E. 1073; *Opel v. Shoup*, 100 Iowa, 407, 69 N. W. 560; *Boyd v. Sachs*, 78 Md. 491, 28 Atl. 391; *Giles v. Little*, 104 U. S. 291; *Martin v. Seigler*, 32 S. C. 267, 10 S. E. 1073; *Woolen v. House* (Tenn.), 36 S. W. 932; *Boyer v. Allen*, 76 Mo. 498; *Knight v. Mahoney*, 152 Mass. 523, 25 N. E. 971; *Redding v. Rice*, 171 Pa. St. 301, 33 Atl. 330; *Nash v. Simpson*, 78 Me. 142, 3 Atl. 53. "The weight of authority is in favor of treating limitations or conditions which are annexed to devises or bequests to the wife of the testator as valid, although they tend to restrain her from marrying again, and although the will does not dispose of the property by a gift over to other persons, in the event of her marrying again": *Knight v. Mahoney*, 152 Mass. 525, 25 N. E. 971. If a testator by one clause of his will gives the residue of his property to his wife, and in a subsequent clause provides that if she marries after his decease she shall take but one-third of such residue, such condition or limitation is not void as in terrorem and as placing a restraint upon marriage. In such case she does not take an absolute title to the residue, but takes two-thirds thereof upon a conditional limitation by which, upon her subsequent marriage, that part of the estate becomes ipso facto intestate, without re-entry or other act by the heirs of the testator: *Bennett v. Packer*, 70 Conn. 357, 66 Am. St. Rep. 112, 39 Atl. 739. The rule under consideration is illustrated by the peculiar case of *Martin v. Seigler*, 32 S. C. 267, 10 S. E. 1073, wherein it appeared that the testator left his estate to his wife for life, and then to his infant daughter. If his wife remarried his estate was then to vest in his daughter in fee, and if both lived and his daughter married the estate was to be equally divided between them. The daughter married and afterward the widow married, and it was held that on the marriage of the widow the whole estate vested absolutely in the daughter. It has been held that a devise to the testator's wife during her natural life or widowhood, with remainder after death or marriage, to her children, must be construed as on condition of remaining unmarried, and void as in restraint of marriage: *Stillwell v. Knapper*, 69 Ind. 558, 35 Am. Rep. 240. This case is in conflict with, and in effect overruled by, the subsequent cases of *Hibbits v. Jack*, 97 Ind. 570, 49 Am. Rep. 478; *Tate v. McLain*, 74 Ind. 493; *Commins v. Commins*, 115 Ind. 163, 16 N. E. 820, 17 N. E. 271, where it is

maintained that a devise to a wife during widowhood, or "so long as she remains my widow," is not in restraint of marriage. The same rule prevails in case of a condition in a will of a testatrix in restraint of the remarriage of her husband. Thus, in case of a devise of land and bequest of personalty to a husband for life, with a gift over to a son and daughter, but with a condition that "if my said husband should get married after my death, in that event, all of my said property to revert to my said son and daughter," the husband's interest in the estate terminates with his remarriage: *Stivers v. Gardner*, 88 Iowa, 307, 55 N. W. 516. The doctrine that a condition in restraint of a second marriage is valid is not limited to conditions against the remarriage of the surviving spouse of the testator or testatrix. Thus a condition avoiding a devise to the widowed daughter of the testator and giving the land to another, if the former shall marry, is valid: *Herd v. Catron*, 97 Tenn. 662, 37 S. W. 551; and a bequest of the interest on a certain fund, to be paid to a legatee during the time that she shall continue the widow of the testator's son, with a bequest of the fund to others at the termination of the first bequest by her marriage, is not a bequest in terrorem, and is valid: *Hotz's Estate*, 38 Pa. St. 422, 80 Am. Dec. 490.

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### BEGGS v. BARTELS.

[73 Conn. 132, 46 Atl. 874.]

**SALES, CONDITIONAL—CONFLICT OF LAWS.**—The law of the state in which a conditional sale is to be performed, or is to have its beneficial effect and operation, rather than the law of the state in which it is made, must determine its validity as between the purchaser and his attaching creditors.

N. R. Hart and J. E. Keeler, for the plaintiff.

C. L. Reid and S. Young, for the defendants.

**133 HALL, J.** The property in question in this suit—a stationary engine, boiler, and machinery—was taken on an execution in favor of the defendants against one Roberts, his title coming from the plaintiffs under a written contract of conditional sale executed in New York. Had it been executed here it would have been an absolute sale, except as between the contracting parties and their personal representatives, since it was not acknowledged before competent authority as required by our statute: Pub. Acts 1895, c. 212.

It is conceded that by the laws of New York it was a valid conditional contract of sale, which did not divest the plaintiffs of their title to the property in question, either as against Rob-

erts or his assigns or creditors. Whether or not the defendants, who were Connecticut creditors of Roberts, obtained a title by the levy of their execution upon the property in Connecticut, depends entirely upon whether the validity of the contract of conditional sale is to be determined by the laws of this state or by those of the state of New York.

From the fact that the contract was executed in New York and the goods were delivered to Roberts upon the cars in that state, it does not necessarily follow that the laws of New York govern upon the question of the validity and effect of the contract. The general rule that the *lex loci contractus* is applicable to the validity and construction of contracts assumes that the contract is to be performed where it is made; and the reason of the rule is that parties are ordinarily supposed to contract in view of the laws in force at the time and place of the making of their contracts. That general rule does not apply when it appears that the contract is to be performed or is to have its beneficial operation and effect elsewhere, or that it is made with reference to the laws of another place: *Burnett v. Pennsylvania R. R. Co.*, 176 Pa. St. 45, 34 Atl. 972; *Wharton on Conflict of Laws*, sec. 401; *Story on Conflict of Laws*, sec. 280. "It is an established principle that contracts are to be construed according to the law of the place in reference to which they are made": *Medbury v. Hopkins*, 3 Conn. 472, 473. "Contracts are to be construed according to the <sup>134</sup> laws of the state in which they are made, unless it is perceived from their tenor that they are entered into with a view to the laws of some other state": *Smith v. Mead*, 3 Conn. 253, 8 Am. Dec. 183; *Greathead v. Walton*, 40 Conn. 226, 236. "The general rule that the *lex loci contractus* shall govern . . . is, theoretically, at least, founded upon the presumed intention that the parties contracted with reference to that law; and when the contract is to be performed elsewhere, or is to have its entire beneficial operation and effect elsewhere, then the law of the latter place is to govern; because, in the absence of anything to the contrary, it is presumed that the parties so intended": *Chillingworth v. Eastern Tinware Co.*, 66 Conn. 306, 317, 33 Atl. 1009.

In the case last cited a chattel mortgage was executed, and was assumed to have been delivered, in New York, by a New York corporation to a New York creditor. The mortgaged property consisted of machinery and implements in use in a factory in Connecticut, and was so described in the mortgage. On the day after its execution in New York it was recorded in the land records in Connecticut where the property was situ-



ated. The mortgage was made in contemplation of insolvency, and was for that reason void by the laws of New York state. This court held that the mortgage was intended "to have its entire beneficial operation and effect" here, and that under the circumstances the mere fact that the instrument was formally executed and delivered in New York was not, of itself, decisive of the question as to what law should control in determining the validity of the mortgage, and that the mortgage was valid in this state until set aside by insolvency proceedings.

The purposes of the conditional contract of sale in the present case were these: To ultimately transfer, upon the payment of the purchase price as agreed, the title to the property in question from the plaintiffs to Roberts; to give the use of the property to Roberts in the meantime so long as he performed his covenants; to secure plaintiffs against loss, by enabling them to retake the property upon Roberts' failure to pay his notes, and by preventing a sale of the property <sup>135</sup> by Roberts to third parties, or a taking of it by attachment by his creditors. For the accomplishment of these purposes the parties intended that the property should be located in Connecticut. The agreement expressly provides that the boiler, engine, etc., shall be "located, used, and employed" by Roberts "in his factory in the city of Stamford," and that they shall not be removed from these premises without the written consent of the plaintiffs. The property was delivered upon the cars in New York to be transported to Connecticut. In pursuance of the terms of the agreement it was taken by Roberts to Stamford and a year afterward was attached there by a Connecticut creditor of Roberts.

While the formal execution of the contract was in New York, the principal acts necessary to effect its objects were by the terms of the contract to be performed in Connecticut. As affording the plaintiffs a security upon the property described, and as transferring to Roberts the apparent ownership of the property by giving to him the possession, the right to use, and even the right to affix it to realty, and as granting to him the absolute title upon payment of the purchase price, the contract was intended to have its operation upon property situated in Connecticut. Excepting that the contract was not acknowledged, it conformed to our law regarding conditional sales. The next day after it was executed it was recorded in the Stamford land records, as required by the law of Connecticut. As was said in *Chillingworth v. Eastern Tinware Co.*, 66 Conn. 306, 33 Atl. 1009, the contract was to have its "beneficial op-

eration and effect" here. The transaction was begun in New York, but was to be performed and completed here, and the parties must be held to have contracted with reference to the law of this state, and that law must govern.

Whether the contention of the defendants may not also be sustained upon considerations of public policy, upon the grounds taken in *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, *Harkness v. Russell*, 118 U. S. 673, 678, 7 Sup. Ct. Rep. 51, *Knowles Loom Works v. Vacher*, 57 N. J. L. 490, 31 Atl. 306, *Marvin Safe Co. v. Norton*, 48 N. J. L. 410, 57 Am. Rep. 566, 7 Atl. 418, and *Thompson v. Taylor* (N. J. June, 1900), 46 Atl. 567, need not be determined by us in this case.

<sup>136</sup> The court of common pleas is advised to render judgment in favor of the defendants.

Costs in this court to be taxed in favor of the defendants.

In this opinion the other judges concurred.

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**Contract.**—The law of the place where a contract is to be performed governs its validity: *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361, 38 S. W. 1068. See, further, the monographic note to *Gist v. Western Union Tel. Co.*, 55 Am. St. Rep. 774-778.

**Conflict of Laws.**—A contract for a conditional sale in one state, executed therein and valid by its laws, is valid as against the attaching creditors of the vendee in another state, to which the property has been removed: *Cleveland Machine Works v. Lang*, 67 N. H. 348, 68 Am. St. Rep. 675, 31 Atl. 20. See, further, the monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 49.

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## BALCH v. CHAFFEE.

[73 Conn. 318, 47 Atl. 327.]

**MORTGAGES TO SECURE FUTURE ADVANCES—VALIDITY AS AGAINST SUBSEQUENT ENCUMBRANCERS.**—As against subsequent encumbrancers, who may take without other notice than that given by the records, future advances cannot be secured by mortgage which does not show any agreement to make them, nor name the amount to which they may be made. No duty of inquiry, in such case, rests upon the subsequent encumbrancer, who in good faith, and in ignorance that such advances have been in fact made, gives credit to the mortgagor in reliance on his title to the equity of redemption, and obtains a lien upon it for his security.

**MECHANICS' LIENS ON APPURTENANCES.**—An artesian well bored as an adjunct to a house, though not physically connected therewith, if essential to its convenient use, is an appurtenance thereto for which a mechanic's lien may be filed and enforced.

Action to foreclose two mortgages. The condition of the first mortgage recited a note in favor of the mortgagee for one hundred and fifty dollars, adding: "And whereas, I may become further indebted to the said grantee as evidenced by other promissory notes hereafter given, now, therefore, if said note or notes shall be well and truly paid according to its or their tenor, then this deed shall be void." When the mortgage was given the mortgagee orally agreed to lend the mortgagor one hundred and fifty dollars more at a subsequent time, and a few weeks later lent him four hundred and fifty dollars, believing such loans to be secured by the mortgage. Within one year the mortgagee loaned the mortgagor two hundred dollars more, taking his note for all sums thus lent after the first mortgage, and a new mortgage to secure it. One month before the last loan one King furnished material and rendered services, under contract with the mortgagor, in the construction of an artesian well on the mortgaged premises, and took the proper steps to obtain a mechanic's lien therefor. Such lien he now seeks to enforce in this suit and recovered judgment to that effect. Plaintiff appealed.

J. E. Cooper and J. H. Kirkham, for the appellant.

S. E. Clark, for the appellee.

**310** BALDWIN, J. The court of common pleas correctly held that as against the defendant King the second mortgage was ineffectual, and the first secured nothing but the money which had been lent before its execution. As against subsequent encumbrancers, who may take title without other notice than that given by the land records, future advances cannot **320** be secured by a mortgage deed which does not show any agreement to make them nor name the amount to which they may be made. No duty of inquiry, in such case, rests upon one who afterward, in good faith, and in ignorance that such advances have been in fact made, gives credit to the mortgagor in reliance on his title to the equity of redemption, and obtains a lien upon it for his security: *Pettibone v. Griswold*, 4 Conn. 158, 10 Am. Dec. 106; *Shepard v. Shepard*, 6 Conn. 37.

Under General Statutes, section 3018, every building for the construction of any of the appurtenances of which any person shall have a claim exceeding twenty-five dollars in amount for materials furnished or services rendered, may, with the land on which it stands and its appurtenances, be subjected to a lien, provided certain conditions are fulfilled on the part of the claim-



ant. The defendant King, who claims such a lien on the premises mortgaged to the plaintiff, has complied with these conditions, and is entitled to preference over the second mortgage, if such an artesian well as he constructed is to be considered as an appurtenance to the house of the mortgagor, within the meaning of the law.

The design of the statute was to give to one who, by furnishing services or materials, under a contract with the owner of land, had added to its value by constructing a building upon it, or any appurtenances to a building, a substantial security for his proper remuneration. The lien which may be created is therefore made to embrace "such land, building, and appurtenances." To carry out this intent, it is necessary to give the statute such a construction, if its terms are doubtful, as may serve to make mechanics' liens of some value: *Lindsay v. Gunning*, 59 Conn. 296, 319, 22 Atl. 310.

The reference in the statute to the appurtenances of a building was plainly meant to cover what might not otherwise have been deemed to belong to it. It is an apt term to describe detached structures, built as adjuncts to a building, to further its convenient use and occupation: *Wilcox v. Woodruff*, 61 Conn. 578, 585, 29 Am. St. Rep. 222, 24 Atl. 521. Such was the well in question. The house would hardly have been habitable without it. That it was dug or bored in the soil below the natural <sup>321</sup> surface of the house lot does not render it any less a work of construction than a tank would be, built above ground and supplied by a force pump. Nor is it material that it was placed in the back yard rather than in the cellar; nor that it was not connected with a kitchen pump. It is also of no consequence that it was built after the house and under a separate and distinct contract: *Fitch v. Baker*, 23 Conn. 563, 567. The important inquiries are whether the house could be conveniently used without it, and whether it could be conveniently used except by those occupying the house. As to the latter point there can be no question that its main value lay in what it was worth to the tenants of that particular building.

There is no error.

In this opinion the other judges concurred.

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**A Mortgage to Secure Future Advances is valid, where the amount of liability is expressly limited, if recorded, as against subsequent encumbrances, except as to advances made after actual, as distinguished from record, notice of a subsequent encumbrance: *Note to Central Trust Co. v. Continental Iron Works*, 40 Am. St. Rep. 544.**

**Mechanics' Liens.**—Appurtenances for which mechanics' liens may be had are discussed in the monographic note to *Pacific Rolling Mill Co. v. Bear Valley Irr. Co.*, 65 Am. St. Rep. 168-171.

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### ALLEN v. SOMERS.

[73 Conn. 355, 47 Atl. 653.]

#### BAILMENTS — COLD STORAGE — CARE REQUIRED.—

Bailees for hire who receive dressed poultry to be kept in "cold storage," and who keep the temperature of their room at the ordinary cold storage temperature, are not, in the absence of specific agreement, liable for a damaged condition of the poultry arising from the fact that the temperature of the cold storage room is too high to preserve it. In such case no duty rests upon the bailees to keep their room at the temperature of a "freezer."

S. Lucas, for the appellant.

D. G. Perkins, for the appellees.

<sup>356</sup> **TORRANCE, J.** In this action the plaintiffs seek to recover compensation for keeping, as bailees of the defendant for hire, certain property in "cold storage." By the pleadings the defendant admitted, in effect, that the amount of compensation claimed was due, but alleged, by way of counterclaim, that the plaintiffs had not used due care in keeping the property, and that as a consequence thereof the property had spoiled and become of no value, and claimed to recover as damages a much larger sum than the amount due for storage charges, less said charges.

The plaintiffs, as a first defense to the counterclaim, denied these allegations, and as a second defense set up a former judgment as a bar. The court held that the former judgment was not a bar, and the case was then tried upon the issues formed by the first defense to the counterclaim.

Upon the trial the following material facts were found by the court: The property in question consisted of dressed poultry, and was known to be such by the plaintiffs when they received it from the defendant. The defendant intrusted it to the plaintiffs in boxes and packages, to be kept in the "cold storage" room of the plaintiffs as bailees for hire. It was received by the plaintiffs in prime condition; but when <sup>357</sup> re-delivered to the defendant it was in bad condition. The term "cold storage," as used in the trade, means a storehouse or store-

room ordinarily used for the preservation of butter and eggs, where the temperature is kept at a low degree but above the freezing point; while a "freezer" is a place for the preservation of meat or poultry where the temperature is kept below the freezing point—from zero up to thirty-two degrees. "I am not satisfied that these technical terms were understood either by the plaintiffs or the defendant, and I find that both parties believed when the poultry was placed in the plaintiffs' room that it was suitable for its preservation."

The plaintiffs exercised due care in the management of their cold storage room while the defendant's property was there, and kept it at a temperature varying from twenty-two to twenty-five degrees above zero, which was a low temperature for a cold storage room, but was too high a temperature to properly keep and preserve poultry for such an extended period as this poultry was kept "or reasonably might have been expected to be kept when placed in storage."

The plaintiffs' cold storage room was not adapted for the safe preservation of poultry for an extended period; and the poultry in question was damaged in consequence of being kept in too high a temperature.

Upon these facts the defendant asked the court, in effect, to rule as follows: 1. That the property being in prime condition when delivered to the plaintiffs and in a damaged condition when received back by the defendant, the burden was upon the plaintiffs to show that they kept said property with ordinary care and diligence; 2. That to keep the property in question with ordinary care and diligence required of the plaintiffs that ordinary care and diligence customary among prudent men engaged in the business of keeping dressed poultry in cold storage, "and that the rule prescribed the diligence of experts as the standard of attention and watchfulness, using the term 'experts' as descriptive of persons having actual knowledge of the business derived from experience."

The court sustained the first of these claims, and about this ruling no complaint is made by either party; but the <sup>358</sup> court also held that upon the facts found the plaintiffs had sustained such burden, and had kept the property with the care and diligence required of them under the circumstances; and the principal, if not the only, question upon this appeal is whether the court erred in so holding.

We are of opinion that it did not err. It appears by the finding that there are two kinds of storage rooms in use, where goods



of a perishable nature are accustomed to be stored for keeping: One known as a "freezer" and the other as a "cold storage" house or room; and that the temperature of the freezer is ordinarily kept much lower than that of the cold storage room. The plaintiffs kept a cold storage room and not a freezer, and this was known to the defendant when he intrusted his property to them. The claim of the defendant in the court below, as we understand it, was, in effect, that unless the plaintiffs kept the temperature of their storage room at the temperature of a freezer, they had not used the care and diligence required of them. If such a duty rested upon the plaintiffs it was imposed either by law or by the agreement of the parties. No claim is or can be made, in the case as it stands, that such a duty was imposed upon them by agreement. No such claim is set up in the pleadings. Even if we assume, as the defendant claims, that the somewhat meager allegations of the counterclaim on this point are helped out by the allegations of the complaint, still, at most, the counterclaim only alleges that the goods were intrusted to the plaintiffs to be kept in cold storage as bailees for hire. There is no allegation that the plaintiffs assumed any other duty toward the defendant than that which the law imposed upon them as cold storage bailees for hire. If, then, the duty to keep their room at the temperature of a "freezer" did not rest upon the plaintiffs by specific agreement, did the law under the circumstances impose upon them any such duty? We think not. The general rule is that a bailee of goods to be kept for hire must in keeping them exercise that degree of care and diligence which may reasonably be expected from a person of ordinary prudence in his situation: *Bradley v. Cunningham*, 61 Conn. 359 485, 496, 23 Atl. 932. This general rule may, of course, be varied by agreement. The case at bar falls within the general rule. The duty of the plaintiffs was to keep the temperature of their room at the ordinary cold storage room temperature. The law under the circumstances of this case imposed that duty upon them, in the absence of specific agreement otherwise; and this was the only duty that rested upon them so far as the temperature of the room was concerned. This duty they fully performed. They did not engage to keep the goods in a "freezer," and were not liable for not doing so.

As the judgment of the court below must stand, it becomes unnecessary to consider the matters set forth in the bill of exceptions on behalf of the plaintiffs which is made a part of the record, and we express no opinion thereon.

There is no error.

In this opinion the other judges concurred.

**The Duty of Warehousemen Imposes on them the exercise of ordinary care only:** *Lancaster Mills v. Merchants'* etc. Co., 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317. See, also, *Higman v. Camody*, 112 Ala. 257, 57 Am. St. Rep. 33, 20 South. 480. As to the liability of owners of cold storage warehouses, consult *Parker v. Union Ice etc. Co.*, 59 Kan. 626, 68 Am. St. Rep. 383, 54 Pac. 672; *Minnesota Butter etc. Co. v. St. Paul etc. Co.*, 75 Minn. 445, 74 Am. St. Rep. 515, 77 N. W. 977.

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## FISH v. SMITH.

[73 Conn. 377, 47 Atl. 711.]

**CORPORATIONS—FOREIGN—CONFLICT OF LAWS.**—A citizen of one state who becomes a shareholder in a corporation created under the laws of another state enters into contract relations, the extent and obligation of which depend largely upon the laws of the latter state. If his shares have not been fully paid up, his obligation to respond to calls made by the corporation binds him also to respond to calls which the corporation ought to have made, but which, by reason of its default in that respect, have been otherwise made in conformity with the laws regulating its affairs.

**CORPORATIONS — FOREIGN — LIABILITY OF STOCK-HOLDERS.**—If the laws of the state wherein a corporation is formed provide for the winding up of insolvent corporations through the agency of a receiver, and empower its courts to call in unpaid stock, and make it payable to such receiver, the latter becomes the statutory successor of the corporation, and as such may sue a stockholder in another state where he resides to recover the balance unpaid on his capital stock.

**CORPORATIONS — FOREIGN — LIABILITY OF STOCK-HOLDERS.**—A stockholder in a corporation against which suit is brought by a creditor to establish its insolvency, and praying for the appointment of a receiver, is a party to the action by representation through the corporation up to the date of the interlocutory judgment appointing a receiver, and he cannot collaterally attack such appointment. Such judgment is conclusive of the necessity of collecting unpaid capital stock to pay corporate debts in an action brought by such receiver or his assignee against a delinquent stockholder in another state.

**TRIAL—PRACTICE.**—A defendant against whose objection an order for substituting a new plaintiff is made, as defendant claims, on insufficient evidence is entitled to the allowance of a proper bill of exceptions, but a refusal to sign such bill of exceptions is harmless if the question is raised and decided on the trial.

**THE ASSIGNMENT OF A CLAIM PENDING SUIT THEREON REQUIRES** no alteration or amendment of the com-  
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plaint, but only an application for a change of parties, and a prima facie right in the assignee is enough to justify an order for his substitution as a party plaintiff.

**CORPORATIONS — STOCKHOLDERS — ESTOPPEL TO DENY CORPORATE ORGANIZATION.**—A stockholder who has received dividends on his stock with knowledge that it is not fully paid up is estopped to deny that the corporation was legally organized when it becomes insolvent, and he is sued for the balance due on his stock.

**TRIAL PRACTICE.**—It is error to expunge a reply stating matters of fact, consistent with the complaint, and sufficient, if true, to avoid the defense.

**EVIDENCE.—FOREIGN LAWS** must always be proved as facts.

**APPELLATE PRACTICE.**—A party cannot profit on appeal by an error into which he has led the trial court.

**CORPORATIONS — FOREIGN — LIABILITY OF STOCKHOLDERS—RECEIVERSHIP—RES JUDICATA.**—The right of a receiver under the statute of the state of his appointment to sell the assets of an insolvent corporation of that state, including his own claim, to himself as trustee for creditors is for the determination of the court in the receiver suit. Its judgment unappealed from is conclusive upon the courts of another state in a suit therein to recover unpaid stock subscriptions from shareholders who were parties by representation to the receivership proceedings.

**CORPORATIONS — ASSETS — LIABILITY OF STOCKHOLDERS.**—The liability of a stockholder in a corporation to respond to calls upon unpaid stock is an asset which the receiver for such corporation may sell and the purchaser may sue for.

**EVIDENCE.—STOCK-BOOKS OF CORPORATIONS** are not admissible in its favor to prove that a certain person is a stockholder when this question is in issue.

**CORPORATIONS — STOCK-BOOKS AS EVIDENCE.**—If the relation of shareholder has otherwise been shown to exist, the books of a corporation become admissible to aid in determining when it commenced and what, if anything, has been paid in upon the shares.

**CORPORATIONS—STOCK-BOOKS AS EVIDENCE.**—Stockholders in moneyed corporations, by their contract of membership, constitute it their agent to keep such stock-books as are usually kept by such organizations, and entries therein made in the due course of business are admissible against them, though not conclusive.

**EVIDENCE—CERTIFICATE OF CORPORATE ORGANIZATION.**—A certificate by a public officer of another state as to the legal organization of a corporation therein is a mere narrative of a past event and of its legal effect, and inadmissible in the courts of a state other than the one in which the corporation is organized.

**CORPORATIONS.—STATEMENTS ON THE MARGIN OF STOCK CERTIFICATES,** showing the amount of the capital stock, the number of shares, and the par value of each, are as much a part of such certificates as if they were embodied in the printed portion thereof.



E. H. Rogers and A. McC. Mathewson, for the appellants.

E. B. Bennett, for the appellee.

<sup>380</sup> BALDWIN, J. The action against the defendant Smith was originally brought by a receiver appointed by a court of the state of Minnesota, to recover an unpaid balance on certain shares held by said Smith, a citizen of Connecticut, in the Northern Trust Company, a Minnesota corporation. The Minnesota proceedings were brought by a creditor of the corporation against it, and the interlocutory judgment appointing the receiver declared that it was insolvent. In a subsequent interlocutory judgment it was found that to pay its debts the whole amount unpaid upon the par value of its capital stock would be required in addition to its other assets, and each of its shareholders was required to pay any balance remaining unpaid upon his shares to the receiver, who was also empowered to sue therefor in any state wherein the shareholders might reside or be found.

A citizen of one state who becomes a shareholder in a corporation created under the laws of another, enters into contract relations the extent and obligation of which depend <sup>381</sup> largely upon those laws. If his shares have not been fully paid up, his obligation to respond to calls made by the corporation binds him also to respond to calls which the corporation ought to have made, but which, by reason of its default in that respect, have been otherwise made in conformity with the laws regulating its affairs.

When the defendant acquired his stock in the Northern Trust Company, there were in existence statutes of Minnesota providing for winding up the affairs of insolvent corporations on a creditor's petition, through the agency of a receiver. In sequestration proceedings of that nature the court could call in any unpaid balance of the capital stock for which the corporation had neglected to call, and the collection of which was necessary to meet its liabilities. The defendant, by his contract of membership, came under the obligation to respond to any demand that might thus be made by the proper court in Minnesota. There the corporation was created. There it was subject to the jurisdiction of the courts. There, should it become insolvent, its affairs would be wound up by judicial proceedings. His obligation to pay the balance due upon his shares was a conditional one. He agreed to pay it when called for by the corporation; but this did not mean that if the cor-

poration wrongfully neglected to make the call he was never to pay it. The law of Minnesota had provided for such a contingency. It had armed, in that case, one of its courts with power to appoint a receiver, and require payment to be made to him. This law entered into the obligation of the defendant's contract. The call made under it converted that obligation from a conditional one into an absolute one, and made the receiver the party to whom its performance was due: *Marson v. Deither*, 49 Minn. 423, 52 N. W. 38. He was, in effect, the statutory successor of the insolvent corporation. Its affairs were to be managed under the laws of Minnesota, while it was a solvent and going concern, by a board of directors; when it ceased to be such, by a receiver appointed in sequestration proceedings: *Relfe v. Rundle*, <sup>382</sup> 103 U. S. 222, 225; *Parsons v. Charter Oak Life Ins. Co.*, 31 Fed. 305; *Hale v. Hardon*, 95 Fed. 747, 37 C. C. A. 240.

In legal effect, then, part of the obligation assumed by the defendant upon entering the Northern Trust Company was that, in case of its insolvency before he had been called upon to pay the balance due upon his shares, he would pay it, should it be needed to satisfy creditors, to a receiver duly appointed in Minnesota. The plaintiff in this action occupied that position, and so became as fully the payee under the defendant's contract of membership as the corporation originally was: *Mann v. Cooke*, 20 Conn. 178, 185, 187; *Johnston v. Allis*, 71 Conn. 207, 217, 41 Atl. 816; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888.

The defendant was a party to the Minnesota action, by representation through the corporation, up to the date at least of the interlocutory judgment declaring it an insolvent debtor and appointing a receiver: *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739; *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 336, 16 Sup. Ct. Rep. 18; *Hanson v. Davison*, 73 Minn. 454, 462, 76 N. W. 254. He cannot, therefore, dispute the validity of that appointment.

The defendant having promised, in legal contemplation, to pay the sum now in question to any receiver properly appointed, the plaintiff was entitled to bring suit on this contract in any state where due service of process could be made. His action was founded, not on the right of a foreign receiver to sue upon demands in favor of the party he may represent, but on the right of a substituted promisee to sue a promisor whose contract provided for such substitution.

The defendant's obligation was such, also, as to imply a promise to pay the sum in controversy to any receiver of the assets of the Northern Trust Company in this state, who might be appointed by a court of this state. The substance of his contract, in the event of its insolvency, was to pay into the trust fund, of which, upon that condition of its affairs, whatever might remain unpaid upon his shares would be a part, all that he thus owed the trust estate. The corporation might sue for it, if its management continued to be in the hands of its own officers. If, in that case, the corporation did not sue, <sup>383</sup> he could be held to answer for it on a creditor's bill. Should, on the other hand, the management of the corporate estate, by reason of its insolvency, be taken in hand by a proper court, his obligation would be to make payment to such agent or trustee as that court might constitute for that purpose. The court might be a Minnesota one. It might be a bankruptcy court of the United States. It might, under certain conditions, be a court of Connecticut. No receiver, however, has been appointed here. No bankruptcy proceedings have been had. The general receiver, appointed in Minnesota, when this action was instituted, was the only party occupying the position of a trustee of this trust fund, and it is to him, under these circumstances, that the law implies a promise by the defendant to pay what the corporation is no longer able to collect.

The complaint, besides setting forth the doings in the Minnesota action, alleges that \$500 is due from the defendant upon his shares; that its payment is required in order to meet the debts of the corporation; that he received due notice of the call by the court; and that he has refused to make payment, though it has been duly demanded. A good cause of action at law was thus set forth, and his original demurrer to the complaint was properly overruled. He subsequently demurred again, for want of an allegation that all the authorized capital stock of the company had been subscribed for. The averments as to this were, that it was incorporated under the laws of Minnesota, with an authorized capital stock of \$500,000, and immediately after commenced the transaction of business as such corporation. These were sufficient. It could not legally have commenced business until whatever amount of capital stock the laws of Minnesota required had been legally taken. Illegality in its action in this particular was not to be presumed. If there had been any, it was matter of defense.

Pending the action Fish resigned his office and his successors were substituted as plaintiffs by order of court. This ac-



tion was proper. Whatever duty the defendant owed to the original receiver, he would equally owe to his successors.

<sup>384</sup> Subsequently the latter were duly discharged from their office, and the suit in Minnesota, in which they were appointed, was dismissed by a decree approving all their previous doings. One of the latter had been an assignment, by special order of court, to the Western Realty Company, a New Jersey corporation, of the demand against the present defendant. The superior court found that it thereby became the bona fide owner of the cause of action, and thereupon, upon its application, ordered its substitution as plaintiff. The defendant tendered a bill of exceptions to this order, setting forth, among other things, that the court had overruled his claim that the application could not be granted without proof that the receivers made the assignment for a valuable consideration. The court refused to sign this bill, on the ground that all the questions which it presented could be made upon the trial.

This action was erroneous. A defendant against whose objection an order for substituting a new plaintiff is made, and made, as he claims, on insufficient evidence, is entitled to the allowance of a proper bill of exceptions by the judge from whom the order is obtained. No harm, however, was done to the defendant by the ruling, as the only substantial question which he desired to present could be and was in fact made at the trial, and thus became a proper ground of appeal. It was first brought to the attention of the court after the dismissal of the Minnesota action and the discharge of the receiver had been suggested by the defendant upon the record. The then plaintiffs met this by filing a paper entitled in the cause as "Reasons for maintenance of the suit in their names." The new facts stated in this paper were, that during the progress of the Minnesota suit the court, after due hearing, approved an offer which had been made to the receivers for the purchase of all the assets of the company, in consideration of the full satisfaction and release of all claims of creditors against it; that pursuant to said order of approval the demand in the present action was afterward duly assigned by the receivers to the Western Realty Company as the assignee of the party making said offer; and that <sup>385</sup> their action in this respect had been approved and confirmed by an order of court, passed on due hearing, in which it was found that said demand and all the other assets of the Northern Trust Company had been duly assigned to the Western Realty Company. To this paper the defendant

demurred, because, among other things, it showed that all claims of creditors had been satisfied and released, and that the receivers had no longer any interest in the cause of action, and did not show that their assignment had been made on any substantial consideration. The demurrer was sustained, whereupon the Western Realty Company filed an application to be substituted as plaintiff, alleging simply that the plaintiffs, since the commencement of the action, had assigned the cause of action to it, and that it was the bona fide owner of it. This application was found true and the order of substitution made.

It is now assigned for error that the complaint should have been, but never was, amended so as to support this substitution and to make the Western Realty Company the plaintiff of record. It could not have been so amended. The demand was one purely for legal relief, and no new matter occurring during the pendency of the action could be introduced to support or enlarge it: *Woodbridge v. Pratt & Whitney Co.*, 69 Conn. 304, 334, 37 Atl. 688; *Goodrich v. Stanton*, 71 Conn. 418, 425, 43 Atl. 74.

The manner in which to bring a title taken by an assignment pending suit to the attention of the court is by and in an application for a change of parties: *Rules of Court*, ed. of 1899, secs. 123, 183. No new cause of action, in such case, has arisen; there has been simply a transfer of the right of action for the original cause.

The application filed by the Western Realty Company may have been demurrable, but no demurrer was filed, and, in the absence of any, the court had a right to take into view the statement in the "Reasons for maintenance of the suit in their names," so recently filed by the receivers. The truth of these had been admitted by demurrer, and they showed that there was what the Minnesota court had determined to be a sufficient consideration to uphold the assignment.

<sup>386</sup> This was sufficient to justify the order of substitution. It gave a prima facie right to it, and that was enough. On the trial, the new plaintiff would still be bound to make out his title to the satisfaction of the jury. As to that inquiry his application served the office of a complaint. He could not recover judgment without establishing the validity of the assignment which he had there alleged.

The substitution was effected when the order that it be made was passed. Nothing further was required to put the new plaintiff in the shoes of the former plaintiffs. It was bound to

prove the cause of action in their favor, as they had alleged it, in order to support the right of action in itself. Their names were properly allowed to remain in the complaint, and its name was properly substituted for theirs in the judgment file.

The defendant contested his liability, before the jury, on the ground, among others, that the Northern Trust Company was never really incorporated, for want of subscriptions for the necessary amount of capital stock. On this point the jury were correctly instructed that, if there was an attempt to organize such a corporation in 1889, under the laws of Minnesota, and the company thereupon commenced business as a corporation, and continued to do such business for seven years and until it was adjudicated insolvent and a receiver appointed, and if, at the latter date, the defendant was a registered shareholder who had previously paid installments on his stock and received dividends thereon, and who held certificates for his shares showing on their face that they were not fully paid up, then he was liable to the receiver for any unpaid balance which he had been ordered to pay to him by the court in the Minnesota suit.

There was evidence that the defendant was an original shareholder, that he held a certificate for his shares, issued in 1892, which stated that the face value of each was \$100, on which \$50 had been paid; and that between 1892 and 1896 he received and accepted five dividends upon this stock. If these were found to be the facts, he was estopped from asserting subsequently, and after the company had been adjudged <sup>387</sup> insolvent, that it never became a corporation: *Canfield v. Gregory*, 66 Conn. 9, 33 Atl. 536.

The first paragraph of the complaint, as amended, alleged that it was duly incorporated, with an authorized capital of \$800,000, and this paragraph was denied by the "first defense." The charge was appropriate to guide the jury in finding the issue thus closed, notwithstanding no estoppel in pais had been specially declared on: *Plumb v. Curtis*, 66 Conn. 154, 173, 33 Atl. 998.

Under the laws of Minnesota, notwithstanding the provision in the articles of association of the corporation that its capital stock should be \$800,000, it was authorized to do business whenever \$500,000 of this was subscribed and \$100,000 of that amount deposited with the state auditor: *Minn. Stats.*, Kelly's ed. of 1891, sec. 2696; Revision of 1894, secs. 2843, 2844. The plaintiff introduced evidence that these conditions were duly complied with. Whether they had been depended on the valid-



ity of a subscription for 800 shares of \$100 each, made in 1889, but payable in 1891, conditioned as follows: "The stock hereby subscribed may be issued in the name of any person or persons designated by the subscriber, and when the amount of stock here subscribed is issued at the request of any subscriber to himself or any other person, the subscriber's liability hereunder is canceled; and if the subscriptions, aside from this, shall equal or exceed \$500,000 on the date named, to wit, January 1, 1891, then this subscription to be null; otherwise, to be of full force."

The jury were properly instructed that this was a valid subscription. It was of no consequence that the subscribers might be discharged by the issue to others, at their request, of the shares thus subscribed for, or by the obtaining of other subscriptions to make up the requisite \$500,000. In either case, the company would receive the same amount of money, though from different persons.

The stipulation in the articles of association for a capital of \$800,000 was to be construed in subordination to the statute which authorized business to be commenced when a <sup>388</sup> less amount should be secured. For all indebtedness incurred in the course of such business, the shareholders were liable to call: *Boston etc. R. R. Co. v. Wellington*, 113 Mass. 79.

It is contended that an incorporation on the basis of a capital less in amount than \$800,000 could not be relied on under the issues closed by the pleadings.

The amended complaint alleged an incorporation with an authorized capital stock of \$800,000. The answer denied that that amount of stock had been secured. The plaintiff then replied that "by said articles of association and the provisions of the laws of Minnesota under which said corporation was organized, it was authorized to exercise its corporate powers and to transact business whenever \$500,000 of its capital stock had been subscribed for; that said sum of \$500,000 was duly subscribed for as required by said laws and in conformity thereto, and that thereafter it began the exercise of its corporate powers and the transaction of business." This reply was expunged on the defendant's motion.

The order for expunging it was erroneous. The reply stated matters of fact, consistent with the complaint, and sufficient, if true, to avoid the defense. A foreign law is always to be proved as a fact: *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. Rep. 242.

The defendant ought not to profit by the error into which he led the trial court. It does not appear that he brought the point now under consideration to the attention of the judge before whom the trial to the jury was conducted. Had he done so an amendment of the complaint would, no doubt, have been allowed. Without determining whether such an amendment was necessary, we are of opinion that no question of variance, founded upon the want of one, ought now to be considered.

The jury were further told that the averment in the complaint that all the unpaid part of the capital stock of the Northern Trust Company would be required to meet its liabilities was conclusively proved by the record of the Minnesota action, in which this fact was found as the basis of an order <sup>389</sup> of court made in 1897, on the petition of the receiver, calling in all sums so remaining unpaid.

This construction was correct, if the defendant at the date of that order was a party to that suit, or in such privity with a party that the latter can be regarded as representing him. The Northern Trust Company, as has been already said, thus represented him up to the time when it was, in 1896, adjudicated to be insolvent and placed in the hands of a receiver. After that time, while it remained a party upon the record, it was necessarily unable to defend itself, or those for whom it might speak, effectually, for it had been deprived of all its financial means. This, however, did not make its shareholders any the less in privity with it. Their relations to it in this respect were fixed by law, and were not to be varied by its loss of property. The adjudication of its insolvency, indeed, made it certain that a call for the balances remaining unpaid on their shares would be necessary, for it could not be insolvent unless its liabilities exceeded its assets, including its entire capital stock, paid and unpaid.

What effect the record of the Minnesota action was to receive in determining these facts was a question dependent on the construction of United States Revised Statutes, section 905, and the superior court properly followed the decisions, as to that, of the supreme court of the United States: *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 336, 16 Sup. Ct. Rep. 810.

The order of assessment was unaffected by the discharge of the receivers. Their cause of action had previously been assigned to the Western Realty Company, and that had the same right as its assignors to rely on the record of the call as proof of its necessity, in any state in which a shareholder might be sued.

It is urged that the defendant is under no liability except to creditors, and that there are now no creditors, since all demands were satisfied by the Western Realty Company. His original liability was to the corporation. Had it never owed a debt to anyone, he could still have been compelled by the directors to pay calls. Having, however, become so deeply indebted as to be insolvent, this liability of his was sold, after <sup>390</sup> a call of the court had made it payable, as a means of satisfying its creditors. That it was a proper subject of sale there can be no doubt, nor could it be discharged by the fact that the price paid for it made the corporation solvent.

The right to make the particular sale now in question is rested on a statute of Minnesota, passed in 1897: Merchants' Nat. Bank v. Northwestern etc. Co., 48 Minn. 363, 51 N. W. 119. This provides that in such a suit against a corporation as that now in question, if the court finds that any of its assets can be turned over to any of its creditors in full satisfaction of their claims, it may order the receiver to invite bids from creditors for such assets, for that purpose, and, on the coming in of the report, may direct the acceptance of any such bid and a conveyance accordingly.

The plaintiff offered evidence to prove that Louis P. Henry and Walter L. Badger, who were the receivers appointed to succeed Fish, the original plaintiff, obtained, upon due hearing had after notice by mail to every shareholder of the Northern Trust Company, including the defendant, orders under this statute, approving a bid which they had made, as trustees of certain of its creditors, for the purchase of all its assets in consideration of the full satisfaction and release of all outstanding claims and liabilities against it; and directing them as receivers to transfer all such assets to themselves as trustees, or to such corporation as they might designate, upon filing in court releases of all such claims and liabilities; and that they thereupon designated the Western Realty Company as the transferee, and consummated the sale, agreeably to these orders, by an assignment afterward ratified and confirmed by the court.

The record of the Minnesota action showed that Henry and Badger were each creditors of the company, individually, and so that they sold as receivers to themselves as trustees and also as beneficiaries.

But that this sale and assignment was warranted by the laws of Minnesota was necessarily adjudicated by the district court of Hennepin county, before which all these proceedings were



had. It could not otherwise have made the order of <sup>391</sup> confirmation. No claim is made that any appeal was taken from that order. It stands, therefore, as the authoritative declaration of the judicial department of another state as to what the law of that state is. It was made in a cause in which not only was the defendant a party by representation, but in which, as the record shows, notice of this particular proceeding had been mailed to him, by order of court. Under these circumstances it is conclusive in the courts of Connecticut as to the construction of the Minnesota statute, and the power of its courts of equitable jurisdiction to allow a receiver to make sale to himself: *Laing v. Rigney*, 160 U. S. 531, 542, 16 Sup. Ct. Rep. 366.

It may be, as is suggested by the counsel for the defendant, that the purchase was a speculative one, and the price low: *Dwinnell v. Badger*, 74 Minn. 405, 77 N. W. 219; *Hospes v. Northwestern etc. Co.*, 48 Minn. 174, 31 Am. St. Rep. 637, 50 N. W. 1117. The place to urge such objections was before the district court of Hennepin county. If made there, they must have been overruled; if not made, they were waived.

The Western Realty Company was incorporated to purchase and control all the assets of the Northern Trust Company. The right to call upon the defendant for any unpaid balance due upon his shares was one of those assets, and the Western Realty Company therefore had power to purchase it.

The plaintiff, after introducing in evidence the certificate of stock held by the defendant, offered the company's stock certificate books and stock ledgers to show that he was an original shareholder, and that his stock was only partly paid. These books were properly admitted. It has been said by some courts that a corporation's stock-books are in all cases evidence in its favor to show that those whose names it has entered as shareholders are such in fact: *Turnbull v. Payson*, 95 U. S. 418. This doctrine has never obtained in this state, and rests on no solid principle: *Carey v. Williams*, 79 Fed. 906, 51 U. S. App. 204. But where the relation of shareholder has been otherwise shown to exist, the books of the corporation become admissible to aid in determining when it commenced and what, if anything, has been <sup>392</sup> paid in upon the shares. Shareholders in a moneyed corporation, by their contract of membership, constitute it their agent to keep such stock-books as are usually kept by similar organizations; and the entries made in due course of business are admissible against them, though not conclusive. Those now in question were not only of the usual nature, but of a kind

expressly required by the laws of Minnesota: Minn. Stats., Kelly's ed. of 1891, sec. 2644; Revision of 1894, sec. 2599.

The plaintiff was also permitted to introduce in evidence a certificate from the secretary of state of Minnesota, under the seal of the state, given in 1897, pending the present action, to the effect that certain individuals, therein named, filed proper articles of incorporation in his office on March 18, 1889, "under the name of the St. Paul and Minneapolis Mortgage Loan and Trust Company, now and since December 14, 1893, Northern Trust Company," with a capital of \$800,000, and were thereby made an existing corporation.

A statute of Minnesota, enacted in April, 1889 (Acts of 1889, c. 226, sec. 1, Kelly's ed. of 1891, sec. 3147; Stat. Rev. 1894, secs. 3394, 3395), provides that whenever any corporation thereafter organized under the general incorporation laws shall have complied with all the statutory requisites, the secretary of state shall issue a certificate of a prescribed form. In this he is to certify, among other things, that the subscribers to the articles of incorporation, "their associates and successors, are legally organized and established as, and are hereby made, an existing corporation." A certificate in this form "shall be prima facie evidence of the existence of such corporation," and it is to be recorded. The second section of this statute also provides that upon application from any corporation which has been duly incorporated previously under the general incorporation laws, and payment of a certain fee, the secretary of state "shall thereupon issue a certificate in the form prescribed in the preceding section," which shall have the same force and effect as attach to those issued under authority of that section.

The certificate admitted in evidence by the superior court was not one of the form thus prescribed. One object of the <sup>393</sup> statute evidently was to create a convenient method of proving the due organization of a corporation formed under articles of association filed in the office of the secretary of state. Another seems to be a provision for a new step in the process of incorporation. The secretary was to examine the files, and if the papers appeared to be such as to satisfy the requirements of the law, to do an act which "made" the associates and their successors and assigns an existing corporation. The certificate now in question is dated in 1897. It refers to articles of incorporation filed on March 18, 1889, and to a change of name made on December 14, 1893, and states that the signers of the articles, "their associates and successors, were legally organized and es-

established as and were thereby made an existing corporation under the name of the St. Paul and Minneapolis Mortgage Loan and Trust Company." This is a narrative of long past occurrences, and the expression of an opinion as to their legal effect. If admissible for any purposes in the courts of Minnesota, as to which we have no occasion to inquire, it is in those of Connecticut mere hearsay, and should have been excluded. No statute of Minnesota could give it the force of evidence in another jurisdiction.

No injury, however, could have been done to the defendant by its admission. It is true that it may have influenced the jury to find that the company was legally incorporated, and that their verdict may have been based on that ground. They were instructed by the court that this certificate was competent evidence tending to show that the executive officers of the state authorized the company to proceed with corporate business upon the assumption that it was duly organized and entitled to act, and so to show either its legal or de facto existence and its change of name. But a certificate from the secretary of state, dated in 1893, had also been introduced, without objection, which had been given shortly after the change of name, by which those originally associating as the St. Paul and Minneapolis Mortgage Loan and Trust Company had become the Northern Trust Company. This certificate was in the form prescribed by the statute, and was <sup>394</sup>presumably offered to show that the final act contemplated by the legislature had been performed, and the incorporators thereby "made" an existing corporation by the name of the Northern Trust Company. As such it was admissible in our courts to show, not that the statements which it contained were true, but the fact that they were thus officially made. The defendant had also laid in a certified copy of the original articles of association filed in 1889. The jury had been informed as to what were the laws of Minnesota under which incorporation had been sought. Under those laws, the articles of association were, on their face, sufficient to support a corporate organization, provided a capital stock of \$500,000 was subscribed, and the proper deposit made with the state auditor: Minn. Stats., Kelly's ed. of 1891, sec. 2696; Revision of 1894, secs. 2843, 2844. Whether \$500,000 had thus been subscribed and the deposit duly made, were questions which were properly submitted. It was not claimed before the superior court, nor has it been claimed here, that the incorporation of the company was defective in any other respect than



that relating to the amount of its capital. That it was a de facto corporation had been established by the pleadings. The complaint alleged due incorporation, and the answer admitted that "the articles of association of said corporation specified that its capital stock should be \$800,000, divided into 800 shares of \$100 each," and that "the defendant became the owner and holder of ten shares of the capital stock of said corporation," and "purchased said stock from said corporation in the open market." That the corporation was not a de jure one, unless its actual capital was at least \$500,000, the jury had been distinctly instructed.

Under these circumstances, and taking the charge as a whole, the verdict cannot have been affected by the introduction of the certificate given in 1897.

The motion to set aside the verdict as against the evidence was properly denied. No question was presented by it which was not otherwise raised, except that in respect to the effect of the defendant's testimony that he was assured by the brokers who, as agents for the company, induced him to take <sup>395</sup> his shares, that there was nothing more to be paid on them. Even if this could have been a defense to a call by the company, it could, after he had allowed eight years to pass in silence, be none to one made upon its insolvency, by order of court, for the benefit of creditors.

Other assignments of error are made, but they have not been argued, and are wholly without merit.

The case against the administrator of the estate of Ebenezer Gilbert differs in no respect from that against Andrew H. Smith, and its disposition is governed by the same principles. That against Henry Rogers presents a single point which is new. His certificate of stock was dated in 1889, and stated that he owned "ten shares of the capital stock of the St. Paul and Minneapolis Mortgage Loan and Trust Company, on each of which had been paid the sum of fifty dollars." The certificate was engraved with a heavy ornamental border, on one side of which were introduced the words, "Capital stock, \$800,000"; and on the other the words, "8,000 shares, \$100 each."

These marginal statements were as much a part of the certificate as if they had been contained in the body of it. The paper, therefore, showed upon its face that the shares were not fully paid up.

There is no error in either judgment.

In this opinion the other judges concurred.

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**Suits by Foreign Receivers** are discussed in the monographic note to *Alley v. Caspari*, 6 Am. St. Rep. 185-189. In *Parker v. Stoughton Mill Co.*, 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751, it is held that a receiver of a foreign mutual insurance company may sue a member for an assessment upon a premium note: See, further, *Wilson v. Keels*, 54 S. C. 545, 71 Am. St. Rep. 816, 32 S. E. 702; *Wyman v. Eaton*, 107 Iowa, 214, 70 Am. St. Rep. 193, 77 N. W. 865; *Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779, 45 Atl. 752. A foreign receiver may maintain an action to compel the payment of unpaid subscriptions if the corporation itself could have maintained it had the stockholder been a citizen of the state in which it was domiciled: See the monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 834.

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## **BROUGHEL v. SOUTHERN NEW ENGLAND TELEPHONE COMPANY.**

[73 Conn. 614, 48 Atl. 751.]

**NEGLIGENCE—DEATH BY WRONGFUL ACT—MEASURE OF DAMAGES—EVIDENCE.**—Under a statute giving the right to recover for a death caused by wrongful act, the mere fact that the death was instantaneous, and that the loss of life was without pain or suffering, does not of itself prevent the recovery of substantial damages by the administrator or executor of the deceased. The measure of damages in such cases is the loss of earning capacity resulting to the decedent himself, and, as a consequence, to his estate. As relevant upon that question, evidence of his age and the general state of his health at the time of his death is admissible.

H. Stoddard, F. L. Hungerford, and J. T. Moran, for the appellant.

E. D. Robbins, for the appellee.

616 **TORRANCE, J.** The important questions upon this appeal are these: 1. Under our statutes relating to death by wrongful act, can there be a recovery of substantial damages for mere loss of life alone? 2. If so, what is the measure of damages in such case? These questions will be considered in the order stated.

When this case was before this court in another aspect of it, one of the points decided was that the mere fact that death was instantaneous, and without pain or suffering of any kind,

did not of itself prevent the recovery of substantial damages: *Broughel v. Southern New Eng. Telephone Co.*, 72 Conn. 617, 45 Atl. 435. In effect, that case, we think, decides the first question against the contention of the defendant. It was found by the trial court, in that case, that death was the sole and only consequence of the negligent act, and yet it was decided that the plaintiff was entitled to recover substantial damages for that consequence. That decision can only be supported on the theory that under our statutes, of the kind here in question, damages may be recovered for the mere loss and deprivation of life alone; for in that case it was found that no other consequence save mere loss of life followed from the negligent act.

A negligent act causing death is an invasion of the right to life, the first and highest of all rights, on which all others <sup>617</sup> are based. That act may be attended by divers consequences and effects. It may be followed, as it is found it was in the present case, by death alone, instantly and painlessly, or it may be followed by bodily and mental suffering and agony as well as by death. We think our statutes make the wrongdoer in such cases liable in damages to the executor or administrator of the decedent for any and all such consequences, and among them for the mere loss and deprivation of life. For such consequences he is to pay "just damages," not exceeding a prescribed amount. This view of this matter was the one taken in *Murphy v. New York etc. R. R. Co.*, 30 Conn. 184, 187. This court there said: "If to take one's liberty or one's property without justification is an injury, how much more is the taking of human life? The elementary books, in speaking of absolute rights, classify them thus: 1. The right of personal security; 2. The right of personal liberty; and 3. The right to acquire and enjoy property. If these rights are valued in this order of preference, then every man of common understanding would at once pronounce it absurd to hold that it is no injury to a person to take his life, while it is to strike him a light blow. Such a distinction is not worth talking about, and has no foundation or existence in the law, as it has none in common sense."

In the legislation of this state, statutes making wrongdoers liable in damages for mere loss of life have been quite common. The first printed edition of the statutes contained a provision of this kind. It was therein provided that if "any person shall lose his life" by means of a defective bridge or highway under certain circumstances, the wrongdoer should pay "to the parents,



husband, wife, or children, or next of kin to the person deceased," the sum of three hundred and thirty-four dollars, to be recovered in an action at law: Revision of 1808, p. 120. In 1851 an act was passed providing that "if any person shall be deprived of life" in consequence of certain acts or omissions of the servants of any railroad company, such company should pay to the parties named in the act the sum of one thousand dollars to be recovered in an action of debt on the statute: Pub. Acts 1851, c. 43. In 1853 an act was passed providing that if the life of any person "shall be lost" under certain prescribed circumstances, by reason of the negligence of a railroad company, such company should be liable to pay damages not exceeding five thousand dollars, nor less than one thousand dollars, to the persons described in the act: Pub. Acts 1853, c. 74. In 1869 an act was passed providing that if the life of any person "shall be lost" by the neglect of a railroad company to maintain fences as prescribed in the act, such company should be liable to pay damages not exceeding five thousand dollars to the persons named in the act: Pub. Acts 1869, c. 48. In 1877 a general act was passed providing that for injuries "resulting in death" from negligence, "the party legally in fault for such injuries" should be liable for "just damages not exceeding five thousand dollars": Pub. Acts 1877, c. 78. These and other acts of a kindred nature, as they existed at the time of the Revision of 1888, were embodied in sections 1008 and 1009 of that revision, and it was under the provisions of these sections that the present suit was brought.

This legislation clearly shows an intent to make wrongdoers, in certain cases and under certain limitations, liable in damages for mere loss or deprivation of life; and there is nothing in any legislation prior or subsequent to 1888 that indicates an intent on the part of the legislature to exempt such wrongdoers from such liability. We are not aware of any decision of this court that is inconsistent with the view here taken of the legislation in question, and we are satisfied that it is the correct one.

The next question relates to the measure of damages for mere loss of life. So far as we are aware, this question, in the precise form in which it is now presented, has not before been passed upon by this court, and we are at liberty to decide it upon principle. It is probably true, in point of fact, that in suits heretofore brought in this state for injuries resulting in death from wrongful act, the value of the life of the deceased has, with other elements, entered into the award of damages; but,

if so, that element has not been, so far as <sup>619</sup> we are aware, separately discussed nor considered by this court. The statutes upon this subject do not, in terms at least, furnish any guide in this matter; they merely provide that the wrongdoer in such cases shall pay "just damages," not exceeding five thousand dollars.

There are, however, certain considerations arising out of the nature and character of this kind of legislation in our state, and out of the nature of death as one of the harmful consequences of an injury, that may serve as guides in coming to a right conclusion in this matter. From the beginning our legislation of this kind was intended to subserve at least two purposes: 1. It was designed to make persons and corporations whose negligence might injuriously affect the lives and limbs of others more careful and circumspect, by continuing their liability for the results of their negligence even after the death of the victim, and by making them liable in damages, to a limited extent, for death, as one of the consequences of that negligence. In this aspect of it, this legislation may be said to be of a punitive or penal character: *Connecticut Mut. Life Ins. Co. v. New York etc. R. R. Co.*, 25 Conn. 265, 273, 65 Am. Dec. 571; 2. This legislation was also, and mainly, designed to make some compensation in money for mere loss of life, which compensation, as part of the estate of the injured party, should go to certain designated persons; not full compensation of this kind for such a consequence, but "just damages," not exceeding a prescribed amount. In this last aspect of it, this legislation plainly contemplates that the extent of such loss may be greater in one case than another; or, to put this in a different way, that the value of the life to the injured party—or, what is the same thing, to his estate—in terms of money may be greater in one case than in another.

Under our decisions the loss of life is not to be estimated from the standpoint of the statutory beneficiaries; their loss, if any, arising from the death, cannot be taken into account: *Goodsell v. Hartford etc. R. R. Co.*, 33 Conn. 51; *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181, 22 Atl. 1083. This being so, the only other thing that can be done is to estimate the loss from the standpoint <sup>620</sup> of the party injured, and thus, in a sense, take the value of his life to him as one of the elements in measuring the damages. But in what sense shall the value of his life to him be taken as such an element? Shall it be what the man thought or imagined his life was worth to

him—that is, what a man would take in exchange for his life? Clearly not. In that aspect of the injury there can be no measure for it, because a man's life to himself, no matter what his age or condition of health or expectancy of life may be, outweighs in value the universe. In that sense it is folly to talk of the value of any life being worth less than the maximum sum prescribed by the statutes. Our statutes, in providing compensation in part for death alone, as the consequence of a negligent act, do not proceed upon any such view of the value of life as this, else would they have provided for a fixed sum as damages in each case; but they proceed, in part, at least, upon the theory that a loss of earning capacity by death is a loss to a man's estate, which may be greater or less according to circumstances, and so, within a maximum limit, a sliding scale of damages is provided. Under these statutes the right to recover a limited compensation for death alone, as one of the results or consequences of a wrong inflicted upon a man in his lifetime, survives to, or is vested in, his executors or administrators for the benefit of certain designated beneficiaries, and is thus in a certain sense made a part of his estate, regarded as that aggregate of rights and possessions which a man leaves at his death. This legislation seems to regard the life of a person injured as having a greater or less value, according to circumstances, to him, or, what is the same thing in this connection, to his estate; and one of its objects in awarding damages for mere loss of life is to compensate his estate, in the sense above explained, for that loss; and in cases like the present, that loss, thus measured, may be the chief or only element to be considered in fixing the extent of the defendant's liability. We do not mean to say that this would be the only element to be considered in cases like the one at bar, but only that ordinarily in them it might or would be the principal element.

621 It is unnecessary here to decide what other elements, if any, may properly be considered in such cases, for we think the trial court took, as the measure of damages in this case, the loss to the estate of Davis in the sense above explained, and it does not appear that in fixing the quantum of damages it considered any other element. It is true, the court says that it took as the measure of damages "the value of the deceased's life, at the time of the injuries, to himself"; and it is true that this language is somewhat ambiguous; it may mean that the court took as the measure of damages what a man would take in exchange for his life, or it may mean that the court measured the



damages by the loss to the estate of the decedent in the sense above explained. We think this last is what the court did, and what it meant to say it did, for it heard, and, we are bound to presume, considered, evidence which it would neither have heard nor considered if it had proceeded upon the other view of the extent of the loss. But it is said that a loss of this kind is too vague, indefinite and uncertain to be estimated pecuniarily, and is, in its nature, incapable of judicial determination. We think there is nothing in this claim.

Injuries, in the sense of wrongful invasions of a right, may be considered as of two kinds: 1. Pecuniary; and 2. Nonpecuniary. Pecuniary injuries are such as can be, and usually are, without difficulty estimated by a money standard. Loss of real or personal property, or of its use, loss of time, and loss of services, are examples of this class of injuries. Nonpecuniary injuries are those for the measurement of which no money standard is or can be applicable. As the books phrase it, damages in such cases are "at large." Bodily and mental pain and suffering are familiar examples of this class. It is within this last class that injury arising from loss of life falls, under our statutes. There is no more legal difficulty in estimating damages for loss of life in cases like the present than there is in estimating damages for bodily or mental pain and suffering, or for maim or disfigurement, or for injured feelings; and yet damages for this sort of injury are being constantly estimated and awarded by the courts in <sup>622</sup> proper cases. The difficulty, or even impossibility, of estimating with certainty in money the amount of injury in this class of cases is never considered a reason for refusing redress: *Cook v. Bartholomew*, 60 Conn. 26, 22 Atl. 444; *Post v. Hartford Street Ry. Co.*, 72 Conn. 362, 44 Atl. 547; *Pennsylvania R. R. Co. v. Allen*, 53 Pa. St. 276; *Ballou v. Farnum*, 11 Allen, 73.

In the view we have taken of this case, the rulings upon evidence of which the defendant complains were correct, and the rulings upon the claims of law made by the defendant were also correct.

There is no error.

In this opinion the other judges concurred.

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An Action for Wrongful Death is not barred by the fact that the death was instantaneous: See the monographic note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 677. The measure of damages in such actions is, in general, the amount of pecuniary assistance and support which those entitled to recover might reasonably have expected to receive from the deceased had

he lived. In estimating the value of the life, the jury may take into consideration the age and health of the deceased at the time of his death: See the monographic note to Louisville etc. Ry. Co. v. Goodykoontz, 12 Am. St. Rep. 378, 379. Consult, also, the recent cases of Florida etc. R. R. Co. v. Foxworth, 41 Fla. 1, 79 Am. St. Rep. 149, 25 South. 338; Matter of Meekin, 164 N. Y. 145, 79 Am. St. Rep. 635, 58 N. E. 50.

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## GARLAND v. GAINES.

[73 Conn. 662, 49 Atl. 19.]

**EVIDENCE.—LETTERS DULY MAILED ARE PRESUMED** to have been received by the addressee.

**EVIDENCE THAT A WRITTEN LEASE** was sent to the nonresident lessee and came back with his name affixed thereto, and that he subsequently occupied the leased premises, is *prima facie* proof of the execution of the lease by him.

**PLEADINGS—INSUFFICIENCY OF ANSWER.**—An allegation by a defendant that he has no knowledge or information sufficient to form a belief as to his execution of a written instrument in suit does not comply with a statute requiring him, if he intends to controvert the execution of such instrument, to deny it specifically. In such case the plaintiff need not prove the alleged execution of the instrument.

**THE FAILURE TO AFFIX INTERNAL REVENUE STAMPS** to a lease as required by United States statute does not render it inadmissible in evidence in the state courts.

**LEASE.—GUARANTY OF PAYMENT OF RENT** and performance of covenants by the lessee during the full term of the lease, made in consideration of the lease of the premises, is an absolute, and not a conditional, undertaking, upon which the guarantor is liable immediately upon the default of the lessee.

**GUARANTY—CONSIDERATION.**—If a guaranty for the performance of the covenants of a lease is executed contemporaneously therewith, and is an essential ground of the credit extended to the lessee, that is sufficient consideration for the contract of guaranty.

**GUARANTY—DELIVERY.**—If a guaranty for the performance of the covenants of a lease is executed subsequently to the lease, it must be deemed to have been made contemporaneously with it, if delivered at the same time and before the lessee is permitted to occupy the leased premises.

H. L. Hotchkiss and H. W. Asher, for the appellant.

W. P. Judson, for the appellee.

**663 HALL, J.** It appears from the finding that the plaintiff leased to the defendant's son, Thomas J. Gaines, Jr., who is alleged to have been at that time a minor, a one-third interest in certain rooms in New Haven, to be occupied by him with two other students from September 29, 1898, to June 29,

1899. Being unwilling to rent the rooms to the son without the guaranty of his father for the payment of <sup>664</sup> the rent, the plaintiff, on the 15th of June, signed in duplicate a lease and sent the same to Thomas J. Gaines, Jr., to be executed by him and to have the guaranty at the foot of the lease signed by his father, they both being out of the state. In July, 1898, the lease was returned to the plaintiff with the names of the son and of the defendant signed, respectively, to the lease and the guaranty, the latter, under the date of July 23, 1898, at New York, where the defendant resided. Thomas J. Gaines, Jr., with the two other students, took possession of the rooms September 29, 1898, and occupied them a few weeks, when, on account of illness, he went away, informing the plaintiff that he would be gone for a few weeks. He did not return, and the two other students, under similar leases to that above described, occupied the rooms until the end of the term.

In November and in December, in reply to letters from the plaintiff requesting payment of the rent which by the lease was payable each fourth week of the term, the defendant wrote, in one letter, that he would inquire into the matter and send check, and in the other, that his son would not be able to return to college during the term, and asking for a rebate of one-half the rent.

On July 1, 1899, plaintiff's attorney wrote the defendant stating the amount of the rent due on the lease executed by his son, that the defendant was guarantor thereon, and asking him what he intended to do regarding it, and informed him that he should bring suit unless he heard from him. It is fairly implied from the finding that this letter was duly mailed. It is therefore to be presumed that it was received. It did not appear that he replied to it. No part of the rent due from Thomas J. Gaines, Jr., has been paid, although demanded both of him and of the defendant.

The guaranty signed by the defendant and made a part of the complaint is as follows: "In consideration of the letting of the premises above described, I, Thomas J. Gaines, of New York, hereby guarantee the payment of said rent and performance of the agreement of the lessee for the full term of this lease." <sup>665</sup> No United States internal revenue stamp was affixed to the lease until the assignment of the case for trial.

Counsel for defendant objected to the admission of the lease and guaranty in evidence, upon the ground that there was no proof of the execution of the same either by said Thomas J.



Gaines, Jr., or by the defendant, and that no internal revenue stamp had been affixed to the lease at the time of its execution.

These objections were properly overruled. The fact that the lease was sent by the plaintiff to Thomas J. Gaines, Jr., to be executed, that he received it, that it was returned to the plaintiff with his name signed to it, and that he afterward occupied the rooms, was *prima facie* proof of the execution of the lease by him.

The plaintiff was not required, under the pleadings, to prove the execution of the contract of guaranty. The defendant's answer that he had no information or knowledge sufficient to form a belief, made to that paragraph of the complaint which alleges that "on or about July 23, 1898, said lease was returned to the plaintiff signed by the defendant, as guarantor, and by Thomas J. Gaines, Jr.," was not a compliance with the provisions of section 874 of the General Statutes requiring that if the defendant intends to controvert "the execution or delivery of any written instrument or recognizance sued upon, he shall deny the same in his answer specifically." The answer made was equivalent to a statement that the defendant could not in good faith deny the execution of the guaranty, but that he would not admit it: *Sayles v. Fitzgerald*, 72 Conn. 391, 44 Atl. 733. But it is only when specifically denied that the plaintiff is required to prove such execution.

The failure to affix a revenue stamp to the lease did not render it inadmissible. The provisions of section 14 of the United States Internal Revenue Law of 1898 do not affect the use as evidence in the state courts of an instrument from which a stamp has been omitted: *Griffin v. Ranney*, 35 Conn. 239; *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339; *Cassidy v. St. Germain*, 22 R. I. 53, 46 Atl. 35.

The letters received by the plaintiff in reply to those written <sup>666</sup> by her to the defendant, and that of the plaintiff's attorney to the defendant, in connection with the other facts of the case, were relevant evidence to prove the execution of the contract of guaranty; but as the plaintiff upon the pleadings was not required to prove that allegation of the complaint, the question of their admissibility becomes unimportant in this case.

The undertaking of the defendant was an absolute, not a conditional, guaranty, and the plaintiff was therefore not required to make further efforts to collect the rent from the lessee in order to enable her to maintain an action against the guarantor. The defendant became liable upon the default

of the lessee: *Camp v. Scott*, 47 Conn. 366, 379; *Tyler v. Waddingham*, 58 Conn. 375, 393, 20 Atl. 335; *Beardsley v. Hawes*, 71 Conn. 39, 40 Atl. 1043.

It is true there must have been a legal consideration for the contract of guaranty, but such consideration need not have moved from the plaintiff to the defendant. If the guaranty was executed contemporaneously with the lease and was an essential ground of the credit extended to the lessee, that was a sufficient consideration: *Cowles v. Peck*, 55 Conn. 251, 256, 3 Am. St. Rep. 44, 10 Atl. 569; *Brandt on Guaranty and Suretyship*, sec. 15. If the guaranty was executed subsequently to the lease, it will be deemed to have been made contemporaneously with it, if delivered at the same time and before the lessee was permitted to occupy the rooms: *Kennedy etc. Co. v. S. S. Construction Co.*, 123 Cal. 584, 56 Pac. 457.

The consideration stated in the guaranty—namely, “the letting of the premises as above described”—was a sufficient one, and was proved by the facts showing that the lease signed by the lessee was not delivered to the plaintiff until after it had been signed by the defendant, that it was so executed and delivered before the commencement of the term, and before the lessee commenced his occupancy, and that the plaintiff rented the rooms to Thomas J. Gaines, Jr., upon the faith of the defendant’s guaranty.

There is no error.

In this opinion the other judges concurred.

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#### OF THE FAILURE TO COMPLY WITH THE STATUTE REQUIRING THE STAMPING OF WRITINGS.

- I. The Provisions of the Act of Congress of 1898.
- II. Of the Power of Congress to Prescribe Rules of Evidence for State Courts.
- III. Cases Holding the Statute was Not Intended to Apply to the State Courts.
- IV. Unintentional Omission of Stamp.
- V. Burden of Proof Respecting Intent of Omissions.
- VI. Secondary or Collateral Evidence of Unstamped Contract.
- VII. Validity of Unstamped Writings.
- VIII. Intent to Evade the Law.
- IX. Writs, Processes, Etc.
- X. The Recording of Unstamped Writings.
- XI. Subsequent Stamping—Time, Place, and Effect.
- XII. Pleading and Practice.
- XIII. Omission of Cancellation.
- XIV. Criminal Prosecutions Based on Unstamped Writings.

**I. The Provisions of the Act of Congress of 1898.**—There can be little doubt that the act of Congress of June 13, 1898, imposing internal revenue taxes, was sufficiently comprehensive in its general phraseology to apply to the state as well as to the national courts. Thus section 7, after providing that persons issuing instruments in writing without the required stamps were guilty of misdemeanor and subject to a fine of not more than one hundred dollars, added, "and such instrument, document, or paper as aforesaid shall not be evidence in any court." Section 14 also provided that, "hereafter no instrument, paper, or document required by law to be stamped which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be regarded as admitted or used in evidence in any court until the legal stamp or stamps denoting the amount of the tax shall have been affixed thereto as prescribed by law." Section 15 proceeds further and apparently attempts to exclude such instruments from the public records. It declares "that it shall not be lawful to record or register any instrument, paper, or document, required by law to be stamped, unless the stamp or stamps of the proper amount shall have been affixed and canceled in the manner prescribed by law; and the record, registry, or transfer of any such instrument upon which the proper stamp or stamps aforesaid shall not have been affixed or canceled as aforesaid shall not be used in evidence."

**II. Of the Power of Congress to Prescribe Rules of Evidence for State Courts.**—The rule is undoubtedly settled beyond question by the great and overwhelming weight of authority that the provisions of the various acts of Congress that no instrument or document, not duly stamped as required by the internal revenue laws of the United States, shall be admitted or used as evidence in any court unless the requisite stamps shall have been affixed thereto, apply only to the courts of the United States, and hence do not prevent the admission of unstamped instruments as evidence in the state courts. The rule that the fact that an instrument has no internal revenue stamp upon it when one is required by the national statute does not render it inadmissible or ineffectual as evidence in the state courts is founded, in the greater number of cases, upon the doctrine that the national Congress has no constitutional power to provide for the exclusion of instruments or documents as evidence in the state courts for want of internal revenue stamps, and that upon a proper construction of the national statutes it has not attempted to do so. In other words, Congress has no power to prescribe rules of evidence for a state court: *Carpenter v. Snelling*, 97 Mass. 452; *Thomas v. State*, 40 Tex. Cr. Rep. 562, 76 Am. St. Rep. 740, 51 S. W. 242; *Garland v. Gaines*, 73 Conn. 662, ante, p. 182, 49 Atl. 19; *Small v. Slocumb*, 112 Ga. 279, 81 Am. St. Rep. 50, 37 S. E. 481; *Knox v. Rossi*, 25



Nev. 96, 83 Am. St. Rep. 566, 57 Pac. 179; Southern Ins. Co. v. Estes, 106 Tenn. 472, 82 Am. St. Rep. 892, 62 S. W. 149; Cassidy v. St. Germain, 22 R. I. 53, 46 Atl. 35; Kennedy v. Roundtree, 59 S. C. 324, 82 Am. St. Rep. 841, 37 S. E. 942; Watson v. Mirike (Tex. Civ. App., 1901), 61 S. W. 538; Spoon v. Frambach (Minn., 1901), 86 N. W. 106; People v. Fromme, 35 App. Div. 459, 54 N. Y. Supp. 833; Gregory v. Hitchcock etc. Co., 63 N. Y. Supp. 975, 31 Misc. Rep. 173; Duffy v. Hobson, 40 Cal. 240, 6 Am. Rep. 617; Steeley v. Steeley (Ky., Oct. 1901), 64 S. W. 642; Bumpass v. Taggart, 26 Ark. 398, 7 Am. Rep. 623; Latham v. Smith, 45 Ill. 29; Craig v. Dimock, 47 Ill. 308; Bunker v. Green, 48 Ill. 243; Hanford v. Obrecht, 49 Ill. 146; Bowen v. Bryne, 55 Ill. 467; Bennett v. Morris (Cal., 1894), 37 \*Pac. 929; Wallace v. Cravens, 34 Ind. 534; Hunter v. Cobb, 1 Bush, 239; Pargoud v. Richardson, 30 La. Ann. 1286; Holt v. Board of Liquidators, 33 La. Ann. 673; Davis v. Richardson, 45 Miss. 499, 7 Am. Rep. 732; Moore v. Moore, 47 N. Y. 467, 7 Am. Rep. 466; More v. Clymer, 12 Mo. App. 11; Schultz v. Herndon, 32 Tex. 390; Jacobs v. Spofford, 34 Tex. 152.

Perhaps the leading case on this subject, or at least the case most frequently cited, is that of Carpenter v. Snelling, 97 Mass. 452, 458, where the court said: "But there is another view of this part of the case which leads us to the conclusion that the want of a stamp did not render the written documents offered by the defendant inadmissible. The provision of the statute already cited does not in terms apply to the courts of the several states. The language of the enactment is only that no instruments or documents not duly stamped shall be admitted or used as evidence in any court until the requisite stamps shall be affixed. This provision can have full force, operation, and effect if construed as intended to apply to those courts only which have been established under the constitution of the United States and by acts of Congress, over which the federal legislature can legitimately exercise control, and to which they can properly prescribe rules regulating the course of justice and the mode of administering justice. We are not disposed to give a broader interpretation to the statute. We entertain grave doubts whether it is within the constitutional power of Congress to enact rules regulating the competency of evidence on the trial of cases in the courts of the several states, which shall be obligatory upon them. We are not aware that the existence of such a power has ever been judicially sanctioned. There are numerous and weighty arguments against its existence. We cannot hold that there was an intention to exercise it, where, as in the provision now under consideration, the language is fairly susceptible of a meaning which will give it full operation and effect within the recognized scope of the constitutional authority of Congress."

In a late case in which the previous decisions of the courts of the several states are cited and reviewed at great length, the doctrine before stated is announced in the following words: "After much reflection and a careful and thorough investigation of cases in the courts of other states, we have come to the conclusion, however, that Congress has no power to prescribe rules of evidence for a state court. Under our system of government, the states retained all powers of sovereignty which were not granted to the general government by the constitution. They had the power to create and establish their own courts, and to regulate the practice and procedure and to prescribe rules of evidence therein. There is nothing in the constitution of the United States which expressly or by implication gives to Congress the power to prescribe rules of evidence for the courts of the states. Of course, Congress, having the power to impose stamp duties, has the power to provide for the enforcement of their payment by any necessary and proper means. But while to make unstamped instruments inadmissible in evidence in state courts would doubtless aid in compelling the payment of the tax, we think that such a method of compelling collection is neither necessary nor proper, and is therefore not within the power of Congress. The act of 1898 subjects to a penalty anyone who fails or refuses to comply with the provisions as to stamping written instruments, and the federal courts have ample machinery for the enforcement of this penalty. No other method of enforcement would seem to be necessary, but even if it were, Congress has power to provide that no unstamped instrument shall be received as evidence in any of the federal courts. An attempt to extend this provision so as to make it applicable to the courts of the several states cannot, therefore, be defended on the ground that it is necessary. Nor do we think it a proper means of enforcing the stamp act to interfere with courts peculiarly within the control of the several states by declaring what shall, or what shall not be used as evidence in them, or to seek to make the state courts punish a failure to comply with the federal stamp act, by refusing to allow unstamped documents to be used as evidence in them": *Small v. Slocumb*, 112 Ga. 279, 81 Am. St. Rep. 52, 53, 37 S. E. 481.

III. Cases Holding the Statute was not Intended to Apply to the State Courts.—Many of the state courts have placed their decisions upon the ground, without passing upon the power of Congress to provide that unstamped instruments shall not be received as evidence in state courts, that the different acts of Congress did not in fact apply to any but the national courts: *Lynch v. Morse*, 97 Mass. 458; *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339; *Moore v. Quirk*, 105 Mass. 49, 7 Am. Rep. 499; *Griffin v. Ranney*, 35 Conn. 239; *Haight v. Grist*, 64 N. C. 739; *Weltner v. Riggs*, 8 W. Va. 445; *Trowbridge v. Addoms*, 23 Colo. 518, 48 Pac. 535;

Rockwell v. Hunt, 40 Conn. 328; Clemens v. Conrad, 19 Mich. 170; Stewart v. Hopkins, 30 Ohio St. 502-524; Dally v. Coker, 33 Tex. 815, 7 Am. Rep. 279; Hale v. Wilkinson, 21 Gratt. 75; Talley v. Robinson, 22 Gratt. 888; Cassidy v. St. Germain, 22 R. I. 53, 46 Atl. 35.

Perhaps the leading case on this branch of the topic is Stewart v. Hopkins, 30 Ohio St. 502-524, wherein it is said: "Without denying that it is within the power of taxation conferred upon Congress to levy taxes and collect them by means of stamps placed upon written instruments, and to enforce the observance of the law by the imposition of penalties, yet the power of Congress to prescribe as a penalty that which invades the rules of evidence in the state courts has been denied by the highest courts of many of the states, and in others so gravely doubted that at the present time it may be regarded as settled by the decided weight of authority that, whether the disputed power exists or not, since the act does not in express terms apply to the courts of the separate states, and the provision excluding unstamped instruments from being given in evidence can have full application and effect by confining it to the federal courts. Its application must be regarded as limited to the courts over which Congress has legislative control."

It is true that a few cases maintain the contrary doctrine, but an exhaustive examination of the authorities leads us to the conclusion that but one of these cases now stands as authority in the state in which it was rendered, and that all of the others have been expressly overruled. The case referred to is Chartiers etc. Turnpike Co. v. McNamara, 72 Pa. St. 278, 13 Am. Rep. 673, wherein it is expressly held that a written instrument not stamped with an internal revenue stamp, as required by act of Congress, is not admissible as evidence in a state court. The same doctrine is maintained in Woodson v. Randolph, 1 Va. Cas. 128, but overruled by Hale v. Wilkinson, 21 Gratt. 75; Talley v. Robinson, 22 Gratt. 888. And the same is true of Howe v. Carpenter, 53 Barb. 382, and Davy v. Morgan, 56 Barb. 218, overruled by People v. Gates, 43 N. Y. 40. The same effect Muscatine v. Sterneman, 30 Iowa, 526, 6 Am. Rep. 685; overruled in Mitchell v. Home Ins. Co., 32 Iowa, 421; Ogden v. Torney, 33 Iowa, 205; Morgan v. Graham, 35 Iowa, 213-217; State v. Shields, 112 Iowa, 27, 83 N. W. 807, Patterson v. Gile, 1 Colo. 200, and other early Colorado cases maintaining the minority doctrine are overruled by Trowbridge v. Addoms, 23 Colo. 518, 48 Pac. 535.

Many of the cases hold that neither the provisions of the acts of Congress invalidating unstamped instruments, nor those excluding them from evidence are applicable in the state courts without apparently making any distinction between the provisions rendering such instruments invalid, and those expressly excluding them



from evidence, and the doctrine announced by these cases is that the omission of stamps required by act of Congress to be placed upon written instruments does not affect the validity of such instruments, or their admissibility in the state courts: *Bowen v. Byrne*, 55 Ill. 467; *Latham v. Smith*, 45 Ill. 29; *Craig v. Dimock*, 47 Ill. 243; *Hanford v. Obrecht*, 49 Ill. 146; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Thompson v. Wood*, 42 Cal. 416; *Wallace v. Cravens*, 34 Ind. 534; *Sporrer v. Elfler*, 1 Heisk. 633; *More v. Clymer*, 12 Mo. App. 11; *Hunter v. Cobb*, 1 Bush, 239.

**IV. Unintentional Omission of Stamp.**—The internal revenue stamp acts of Congress provide in effect that any person who shall make, sign, or issue any instrument without its being stamped, "with intent to evade the provisions of this act" shall be liable to a penalty, and such instrument shall be deemed invalid, and of no effect, and the great weight of authority in the state courts in construing such provision hold that the words "with intent to evade the provisions of this act" qualify the clause rendering unstamped instruments invalid and inadmissible in evidence, and accordingly establish the doctrine that an unstamped instrument is neither invalid nor inadmissible in evidence in the state courts, unless an intent is plainly shown to evade the payment of the internal revenue required by the national statute. In other words, an innocent omission to stamp such instrument does not render it invalid or inadmissible in the state courts: *Tobey v. Chipman*, 13 Allen, 123; *Hooper v. Whitaker* (Ala. 1901), 30 South. 355; *Spoon v. Frambach* (Minn., 1901), 86 N. W. 106; *Plunkett v. Hanschka* (S. Dak., 1901), 85 N. W. 1004; *Cassidy v. St. Germain*, 22 R. I. 53, 46 Atl. 35; *Craig v. Dimock*, 47 Ill. 309; *Whigman v. Pickett*, 43 Ala. 140; *Hitchcock v. Sawyer*, 39 Vt. 412; *Weltner v. Riggs*, 3 W. Va. 445; *Rheinstrom v. Cone*, 26 Wis. 163, 7 Am. Rep. 48; *Perryman v. Greenville*, 51 Ala. 507; *Bibb v. Bonds*, 57 Ala. 509; *Trowbridge v. Addoms*, 23 Colo. 518, 48 Pac. 535; *Emery v. Hobson*, 63 Me. 33; *Boehne v. Murphy*, 46 Mo. 57, 2 Am. Rep. 485; *Schermerhorn v. Burgess*, 55 Barb. 422; *Timp v. Dockham*, 29 Wis. 440; *Fenelon v. Hogoboom*, 31 Wis. 172; *Smith v. Scott*, 31 Wis. 437; *Black v. Woodrow*, 39 Md. 194; *Waterbury v. McMillan*, 46 Miss. 635.

**V. Burden of Proof Respecting Intent of Omissions.**—All of the above cases holding that a mere failure to stamp an instrument does not show an intention to evade the law so as to render the document inadmissible in evidence, also hold that such intent must be expressly shown, and hence necessarily place the burden of proof upon the person objecting to show such intent. Many cases expressly announce the rule that one who seeks to exclude from being given in evidence an instrument by reason of its invalidity in not being properly stamped must show affirmatively that the omission was with intent to evade the provisions

of the act: *New Haven etc. Co. v. Quintard*, 37 How. Pr. 29, *Waterbury v. McMillan*, 46 Miss. 635; *Burnap v. Losey*, 1 Lans. 111; *Baker v. Baker*, 6 Lans. 509; *Quinn v. Lloyd*, 1 Sweeney, 253; *People v. Gates*, 43 N. Y. 40; overruling the same case reported in 57 Barb. 291, and in effect overruling other cases in *Barbour's Reports* maintaining a contrary doctrine, as *Howe v. Carpenter*, 53 Barb. 382. The doctrine of *People v. Gates*, 43 N. Y. 40, was reaffirmed in *Moore v. Moore*, 47 N. Y. 467, 7 Am. Rep. 466, where it was decided in addition that an instrument was not invalid simply because it was not duly stamped, as such omission did not show an intent to evade the law.

#### VI. Secondary or Collateral Evidence of Unstamped Contract.—

It has been held that if a written instrument which is the foundation of the action is not stamped, and is excluded as evidence for that reason the contract evidenced by such written instrument cannot be proved by parol: *Mobile etc. R. R. Co. v. Edwards*, 46 Ala. 267. But if a written instrument, not the foundation of the action, is offered in evidence by a person not a party to the document, as an admission of the adverse party touching a matter in issue, the fact that it is not stamped is no ground of objection to its admission: *Reis v. Hellman*, 25 Ohio St. 180. If suit is brought upon the original consideration for which an unstamped note is given, the note is admissible in evidence to explain the testimony of a witness in reference to the date of a settlement between the parties, and the amount found due: *Israel v. Redding*, 40 Ill. 362.

VII. Validity of Unstamped Writings.—A few early cases maintained that an instrument not stamped as required by the national statute was void, but all of such cases have since been expressly overruled in the states in which they were decided. Hence no further attention need be paid to them. It is now a rule of universal application that a failure to attach an internal revenue stamp to an instrument required by act of Congress to be stamped does not invalidate it. This rule has been based upon the opinion that "without denying that it is within the power of taxation conferred upon it for Congress to lay an excise tax upon the business operations of communities, and to collect that tax by means of stamps, to be placed upon written instruments exchanged between contracting parties, and to enforce the observance of the law, to that end, by the imposition in it of penalties for its nonobservance, it is without that power to declare that a contract or conveyance between citizens of a state is void, for the reason that such observance has been omitted": *Moore v. Moore*, 47 N. Y. 467-469, 7 Am. Rep. 466. This case has been followed with approval in *Gregory v. Hitchcock Pub. Co.*, 63 N. Y. Supp. 975, 31 Misc. Rep. 173; *Daly v. O'Rourke*, 70 N. Y. Supp. 694, 59 App. Div. 576; *Hunter v. Cobb*, 1 Bush, 239.

The cases holding that the absence of a revenue stamp from a written instrument does not of itself render such instrument invalid are very numerous, and among them may be cited, *Trowbridge v. Addoms*, 23 Colo. 518, 48 Pac. 535; *Dudley v. Wells*, 55 Me. 145; *Bumpass v. Taggart*, 26 Ark. 398, 7 Am. Rep. 623; *Bowen v. Bryne*, 55 Ill. 467; *Tobey v. Chipman*, 13 Allen, 123; *Gaylor v. Hunt*, 23 Ohio St. 255; *Whitehill v. Shickle*, 43 Mo. 537; *Morris v. McMorris*, 44 Miss. 441, 7 Am. Rep. 695; *Cassidy v. St. Germain*, 22 R. I. 53, 46 Atl. 35; *Rheinstrom v. Cone*, 26 Wis. 163, 7 Am. Rep. 48. The internal revenue laws of the national government were not in operation in the Confederate states during the Civil War, and it was therefore unnecessary during that time in such states to stamp instruments in order to make them valid: *McElvain v. Mudd*, 44 Ala. 48, 4 Am. Rep. 106; *Lewis v. Hearne*, 34 Tex. 383; *Van Alstine v. Shirley*, 32 Tex. 518; *Susing v. Williams*, 1 Heisk. 625; *Stolte v. Herndon*, 32 Tex. 393.

VIII. Intent to Evade the Law.—Under the stamp acts of Congress declaring a written instrument invalid and of no effect if there is an "intent to evade the provisions" of the statute, many cases decide that in order to authorize the court to declare an unstamped instrument void, there must be an intent shown to evade the law, otherwise the instrument must be declared valid: *Dudley v. Wells*, 55 Me. 145; *Weltner v. Riggs*, 3 W. Va. 445; *Campbell v. Wilcox*, 10 Wall. 421; *Harper v. Clark*, 17 Ohio St. 190; *Stewart v. Hopkins*, 30 Ohio St. 502; *McGovern v. Hoesback*, 53 Pa. St. 176; *Hitchcock v. Sawyer*, 39 Vt. 412; *Vorebeck v. Roe*, 50 Barb. 302; *Howe v. Carpenter*, 53 Barb. 382; *Schermerhorn v. Burgess*, 55 Barb. 422; *Vaughn v. O'Brien*, 57 Barb. 491; *Hallock v. Jaudin*, 34 Cal. 168; *Mitchell v. Home Ins. Co.*, 32 Iowa, 421, overruling prior Iowa cases; *Ogden v. Forney*, 33 Iowa, 205; *Morgan v. Graham*, 35 Iowa, 213; *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339; *Moore v. Quirk*, 105 Mass. 49, 7 Am. Rep. 499; *Cabbott v. Radford*, 17 Minn. 320.

The burden of proof is upon the person who disputes the validity of the instrument on the ground that it does not have the requisite revenue stamp as required by law to show that such stamp was omitted with fraudulent intent to evade the revenue statutes: *Grant v. Connecticut etc. Ins. Co.*, 29 Wis. 126; *Timp v. Dockman*, 29 Wis. 440; *Sawyer v. Parker*, 57 Me. 39; *Brown v. Thompson*, 59 Me. 372; *Schermerhorn v. Burgess*, 55 Barb. 422; *Fenelon v. Hogoboom*, 31 Wis. 172; *Smith v. Scott*, 31 Wis. 437; *Waterbury v. McMillan*, 46 Miss. 635; *Taft v. Simpson*, 125 Mich. 206, 84 N. W. 77; *Whigham v. Pickett*, 43 Ala. 140.

IX. Writs, Processes, etc.—Although there is some conflict in the authorities, undoubtedly the better rule is that announced by the cases which hold that Congress has no power, under the pretense of raising a revenue, to impose a tax upon writs and process



issuing out of state courts, and hence that the omission of a revenue stamp upon a writ or process of a state court does not invalidate it nor in any way affect it. This doctrine is placed upon the ground that the state and national governments are sovereign and independent within their respective spheres, and as the states cannot tax any of the constitutional means employed by the general government wherewith to execute its constitutional powers, so neither can the national government impose a specific tax of any kind upon any of the indispensable governmental functions of the states, and of this character are the writs and processes of the state courts: *Craig v. Dimock*, 47 Ill. 308; *Smith v. Short*, 40 Ala. 385; *Warren v. Paul*, 22 Ind. 276; *Walton v. Bryenth*, 24 How. Pr. 357; *Dawson v. McCarty*, 21 Wash. 314, 316, 75 Am. St. Rep. 841, 57 Pac. 816; *Jones v. Keep*, 19 Wis. 390. This doctrine has been extended to official bonds given to a state by its officers: *Bettman v. Warwick*, 108 Fed. 46; *State v. Garton*, 32 Ind. 1, 2 Am. Rep. 315; and to notices of appeal: *Swift v. Cornes*, 20 Wis. 397.

On the other hand, it has been held that an act of Congress requiring internal revenue stamps to be affixed to writs and process of courts is not an improper interference with the powers of a state court. Hence, a summons issued without such stamp was held void and not capable of being made validly: *Kranz v. Schirmann*, 25 How. Pr. 388; *Cole v. Bell*, 58 Barb. 194. The same rule has been applied to a copy of a summons, although the original summons was properly stamped: *Watson v. Morton*, 26 How. Pr. 383. It has also been held that the payment of the stamp duty required by the act of Congress is a prerequisite to a grant of administration without which the letters are void: *Werbiskie v. McManus*, 31 Tex. 116; *Blake v. Hall*, 19 La. Ann. 49. It has also been held that a record on appeal is void unless stamped with the requisite revenue stamps: *Musselman v. Mauk*, 18 Iowa, 239; *Reddick v. White*, 46 La. Ann. 1198, 15 South. 487.

**X. The Recording of Unstamped Writings.**—The provisions of the United States internal revenue statutes providing that unstamped instruments shall not be recorded, or, if recorded, the record thereof shall be void applies only to such instruments as are required to be recorded by national legislation, and to officers under national control. Such statutes do not, in any way, affect the recording of such instruments under state laws: *Moore v. Quirk*, 105 Mass. 49, 7 Am. Rep. 499; *Stewart v. Hopkins*, 30 Ohio St. 502; *People v. Fromme*, 54 N. Y. Supp. 833, 35 App. Div. 459.

**XI. Subsequent Stamping—Time, Place and Effect.**—The decisions as to the right to stamp and as to the effect of a subsequent stamping of an unstamped instrument have been so varied as to render it impossible to classify them to any considerable extent. The cases establish one rule at least quite clearly, and that is, that if

objection is made to the instrument that it is invalid or inadmissible in evidence because unstamped it may be then stamped and the objection overcome. Thus, it has been held that the holder of an unstamped instrument may stamp it either before or after action brought; and it is admissible in evidence if stamped when offered: *Day v. Baker*, 36 Mo. 79; *Wight v. McFadden*, 25 Ind. 483; *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618. If the omission of the stamp is not with intent to evade the revenue law, it seems that the stamp may be affixed either before the collector of revenue or in the presence of the court, and no objection will then lie to the validity of the instrument or to its admissibility as evidence for want of a stamp prior to that time: *Dorris v. Grace*, 24 Ark. 326; *Tobey v. Chipman*, 13 Allen, 123; *Garland v. Lane*, 46 N. H. 245; *Morris v. McMorris*, 44 Miss. 441, 7 Am. Rep. 695; *Foster v. Holley*, 49 Ala. 593; *Waterbury v. McMillan*, 46 Miss. 655; *Patterson v. Eames*, 54 Me. 203; *Carpenter v. Johnson*, 1 Nev. 331; *Beebe v. Hutton*, 47 Barb. 187; *Boly v. Lake*, 54 Mo. 202; *Chaffe v. Ludeling*, 27 La. Ann. 607. Some cases hold, however, that the stamp must be affixed by the collector of the district, and that it cannot be affixed by the court upon the trial: *Mobile etc. R. R. Co. v. Edwards*, 46 Ala. 267; *Currie v. Billin*, 23 La. Ann. 250; *Succession of Barnard*, 24 La. Ann. 402; *Whigham v. Pickett*, 43 Ala. 140. If it appears that the interested party to an unstamped instrument has paid the full price of the stamp as well as the penalty, and has produced the internal revenue collector's receipt therefor, the instrument must be received in evidence, although such collector has not affixed and canceled the stamp, as it was his duty to do: *Lerch v. Snyder*, 112 Pa. St. 161, 4 Atl. 336.

In *Killip v. Empire Mill Co.*, 2 Nev. 34, it was held, and, we think, properly decided, that a revenue stamp may be affixed to the notice of appeal even after motion to dismiss; and when so affixed, it renders the notice operative from the time of filing. It was also held in *Coppernoll v. Ketcham*, 56 Barb. 111, that the court had power to permit such stamp to be affixed to the notice of appeal, and thus perfect the appeal in the appellate court. This case also held that Congress has no power to prohibit state courts from taking jurisdiction of an action for want of an internal revenue stamp: *Coppernoll v. Ketcham*, 56 Barb. 111. In *State v. Way*, 15 Iowa, 596, it was held that the attorney general might affix a stamp to the clerk's certificate of the transcript on appeal and thus obviate the statutory objection. Other Iowa cases held, on the contrary, that the court had no power to permit the notice of appeal to be stamped after the appeal was otherwise perfected, and that the appeal must therefore be dismissed if the notice thereof did not bear the required stamp: *Hagus v. Strickler*, 19 Iowa, 414; *O'Hare v. Leonard*, 19 Iowa, 515; *Botkins v. Spurgeon*,

20 Iowa, 598. These cases, of course, conflict with the view expressed ante, that Congress has no power to tax the process of state courts.

An agreement for submission of a question to arbitration may be stamped after the award is made: *Holyoke Machine Co. v. Franklin Paper Co.*, 97 Mass. 150.

It appears to be the better rule that anyone having an interest in an unstamped instrument may apply to the internal revenue collector to have the necessary stamp affixed; *Schermerhorn v. Burgess*, 55 Barb. 422; *Blunt v. Bates*, 40 Ala. 470. Thus, an attorney in whose hands a note is placed for collection has such an interest therein, by virtue of his general authority, as authorizes him to have the stamp affixed to the note, when this is necessary to protect the interests of his client: *Blunt v. Bates*, 40 Ala. 470. It has been held, however, that the party executing the instrument is the only one to affix the stamp, and that it cannot be affixed and canceled by another party without the actual knowledge, and express or implied consent of the party issuing the instrument. The latter is also the exclusive person who may appear before the collector and procure the stamping and cancellation: *Meyers v. Smith*, 48 Barb. 614. In *Stolte v. Herndon*, 32 Tex. 393, the opinion was expressed that deputy collectors of internal revenue had the same power as collectors to affix stamps when satisfied that the failure to affix the stamp at the proper time was not with intent to evade the law, and in such case to remit the penalty. And in *Deskin v. Graham*, 19 Iowa, 553, it was held that the deputy collector had such authority during the sickness or temporary disability of the collector, and that when he exercised such power, such disability would be presumed. On the other hand, it has been held in the same state that the deputy collector has no power to stamp instruments and remit penalties, except when he acts during the disability of the collector, and under his special authority, and that such special authority cannot be presumed from the stamping of the instrument, if the certificate of the collector is not authenticated by the seal of the collector. In such case the deputy's act is a nullity: *Muscatine v. Sterneman*, 30 Iowa, 526, 6 Am. Rep. 685; *Brown v. Crandall*, 23 Iowa, 112; *McAfferty v. Hale*, 24 Iowa, 355. If it appears to the collector that the proper stamp was omitted from the instrument by mistake or inadvertence, he may affix the stamp and remit the penalty: *Browne v. Steck*, 2 Colo. 70; *Green Mountain etc. Institute v. Britain*, 44 Vt. 13; and his acts and decisions are final and conclusive: *Green Mountain Institute v. Britain*, 44 Vt. 13; *Hoppock v. Stone*, 49 Barb. 524. And when the proper revenue officer has stamped an instrument and certified thereto, he must be presumed to have affixed the proper amount of stamps required by the statute: *Frazer v. Robinson*, 42 Miss. 121; *Lerch v. Snyder*, 112 Pa. St. 161, 4 Atl. 336.



If an instrument is inadvertently left unstamped at the time of its execution, and the requisite stamp is subsequently affixed, either in the presence of the court, or by the proper internal revenue collector, it is as valid to all intents and purposes as if stamped when made or issued and, consequently, is admissible in evidence, nor can its validity be successfully assailed when it is the foundation of the action: *Dorris v. Grace*, 24 Ark. 326; *Gibson v. Hibbard*, 13 Mich. 214; *Aldrich v. Hagan*, 50 N. H. 60; *Knox v. Huidekoper*, 21 Wis. 527; *Tripp v. Bishop*, 56 Pa. St. 424; *Logan v. Dills*, 4 W. Va. 397; *Stewart v. Hopkins*, 30 Ohio St. 502. It is also generally held that if an unstamped chattel mortgage is subsequently properly stamped, even after being recorded, it is valid as against attachment creditors of the mortgagor, or as against an assignee for his creditors: *Vail v. Knapp*, 49 Barb. 299; *Hoppock v. Stone*, 49 Barb. 542; *Sawyer v. Parker*, 57 Me. 39; *Wilson v. Reuter*, 29 Iowa, 176. The contrary doctrine has also been announced: *McBride v. Doty*, 23 Iowa, 122; *Miller v. Morrow*, 3 Cold. 587.

**XII. Pleading and Practice.**—Many cases sustain the proposition that the stamp is no part of the instrument, and that a demurrer does not lie to a complaint, declaring on a written instrument, because it fails to show or aver that such instrument had the requisite internal revenue stamp affixed to it. This doctrine necessarily follows from the rule that, in order to defeat a recovery upon an unstamped instrument, it must appear not only that it is unstamped, but also that the stamp has been fraudulently omitted with intent to evade the revenue laws. This, of course, cannot be done on demurrer to the complaint, but only by answer: *Hallock v. Jaudin*, 34 Cal. 167; *Trull v. Moulton*, 12 Allen, 396; *Cabbott v. Radford*, 17 Minn. 320; *Owsley v. Greenwood*, 18 Minn. 429; *Miller v. Henderson*, 24 Ark. 344; *Campbell v. Wilcox*, 10 Wall. 421; *Jones v. Davis*, 22 Wis. 422; *Armendiaz v. Serna*, 40 Tex. 291. In *McBride v. Doty*, 23 Iowa, 122, it was held that an answer was demurrable because it failed to show that the instrument relied upon by defendant was stamped as required by statute. This case, however, is necessarily overruled by *Mitchell v. Home Ins. Co.*, 32 Iowa, 421, and *Record v. Jones*, 33 Iowa, 26. Objection to the admissibility in evidence of an instrument because it is not stamped as required by the revenue law must be made when it is offered, otherwise it cannot be considered: *Morlee v. Edwards*, 20 La. Ann. 236; *Thompson v. Wilson*, 26 Iowa, 121. Such objection cannot be made for the first time when the report of a referee comes up for confirmation: *Jones' Appeal*, 62 Pa. St. 324. An objection that the instrument is not stamped with internal revenue stamps cannot be raised for the first time on appeal: *Andrews v. Poe*, 30 Md. 485; *Hawkins v. Wilson*, 1 W. Va. 117. It makes no difference whether such objection goes to the validity of the instrument, or its admissibility for

want of the stamp: *Andrews v. Poe*, 30 Md. 485; *Cole v. Bell*, 48 Barb. 194; *Miller v. Larmon*, 38 How. Pr. 417; *Baird v. Pridmore*, 31 How. Pr. 359. In *Whitehill v. Shickle*, 43 Mo. 537, it was held that the defendant must raise the defense that the instrument sued upon was 'unstamped', by his answer, or he must be deemed to have admitted its validity and cannot raise that issue afterward. If the maker of an instrument prevents it from being properly stamped, or if he neglects to stamp, or inadequately stamps it, he is a wrongdoer, and can take no advantage of his own wrong. Hence, he cannot be heard to object to its admissibility in evidence: *Alexander v. Leith*, 39 Ga. 180; *Jacquin v. Warren*, 40 Ill. 459. Nor can he draw any protection from his wrongdoing: *Chaffee v. Ludeling*, 27 La. Ann. 607; either in avoidance of the instrument: *McGovern v. Hoesback*, 53 Pa. St. 176; or by way of reversal of a judgment: *Mogelin v. Westhoff*, 33 Tex. 788. An instrument bearing the proper revenue stamps when offered or introduced in evidence is presumed to have been stamped at the proper time and by the proper party, and the burden of proof is upon the objector to show the contrary: *Iowa etc. R. R. Co. v. Perkins*, 28 Iowa, 281; *Union etc. Assn. v. Neill*, 31 Iowa, 95; *Grand v. Cox*, 24 La. Ann. 462; *Meyers v. McGraw*, 5 W. Va. 30. If it appears that at the time of the execution of the instrument it was not stamped, but is stamped when offered in evidence, the question of when and by whom it was stamped may properly be submitted to the jury under the evidence: *Platt v. Broach*, 36 How. Pr. 138. If the instrument is not stamped when offered, the jury may determine from the evidence whether it was originally stamped as required by law: *Alexander v. Leith*, 39 Ga. 180.

**XIII. Omission of Cancellation.**—A failure to conform to the prescribed form for the cancellation of revenue stamps or an entire failure to cancel them, does not render the instrument bearing them either invalid or inadmissible in evidence: *Foster v. Holley*, 49 Ala. 539; *D'Armond v. Dubose*, 22 La. Ann. 131, 2 Am. Rep. 718; *Patterson v. Gile*, 1 Colo. 200; *Goodwine v. Wands*, 25 Ind. 101; *Adams v. Dale*, 29 Ind. 273; *Union etc. Assn. v. Neill*, 31 Iowa, 95; *Blunt v. Bates*, 40 Ala. 470; *Schultz v. Herndon*, 32 Tex. 390; *Jacobs v. Cunningham*, 32 Tex. 774; *Desmond v. Norris*, 10 Allen, 250. The cancellation may be made by the payee as well as by the maker of the contract or note, and the initials of the former may be used in such case: *Schultz v. Herndon*, 22 Tex. 390; *Foster v. Holley*, 49 Ala. 593; *Adams v. Dale*, 29 Ind. 373.

**XIV. Criminal Prosecutions Based on Unstamped Writings.**—It is a universal rule that forgery may be committed of an unstamped instrument, and that it need not be alleged in an indictment for forging a draft, check, note, order for money, or other instrument required by internal revenue statutes to be stamped, that the in-

strument alleged to have been forged had the proper revenue stamp attached. A conviction under such indictment is good without proof of such fact, if the instrument is proved to be false and forged, and made with the intent charged. In other words, it is not necessary that a forged instrument should be stamped when forged and uttered in order that it should operate to the injury of another's rights, and hence the indictment for forgery need not allege that the instrument was stamped: *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474; *State v. Mott*, 16 Minn. 472, 10 Am. Rep. 152; *Miller v. People*, 52 N. Y. 304, 11 Am. Rep. 706; *State v. Haynes*, 6 Cold. 550; *State v. Young*, 47 N. H. 402; *Laird v. State*, 61 Md. 309; *Horton v. State*, 32 Tex. 80; *State v. Hill*, 30 Wis. 416; *Thomas v. State*, 40 Tex. Cr. Rep. 562, 76 Am. St. Rep. 740, 51 S. W. 242; *State v. Shields*, 112 Iowa, 27, 83 N. W. 807. It has also been held that the revenue stamp clearly forms no part of the instrument alleged to have been forged, and a failure to allege that the instrument was stamped constitutes no variance: *Miller v. People*, 52 N. Y. 304, 11 Am. Rep. 706. The reason for the rule, that the fact that the instrument described in the indictment was unstamped constitutes no defense to the crime of forging it, is thus clearly set forth in *Laird v. State*, 61 Md. 312, as follows: "We come now to the last objection, that the check was unstamped, and therefore invalid and of no effect, and it was urged that there can be no such thing as forgery of an instrument, which, if genuine, would not be valid. One cannot, it is true, be convicted of the forgery of a paper absolutely invalid upon its face, and which could not operate to the prejudice of another. But it has never been held that an unstamped instrument is per se invalid. On the contrary the decisions are all the other way, and on two grounds: 1. The stamp laws were intended as revenue laws, and to render the contract invalid or inadmissible in evidence it must appear affirmatively that the omission to stamp it was with fraudulent intent to evade the law; and 2. Upon application to the proper officer, the stamp may be affixed, upon the payment of the penalty, or without payment if the omission to stamp it was by reason of accident, mistake, or inadvertence, and we may also add that it is plain that the stamp laws can only be applicable to a genuine instrument, because a forged instrument when discovered to be such, never can be made available though stamped, and such laws can, therefor, only be understood as requiring stamps on such instruments as were available without a stamp before the laws were passed, and which would be available afterward with a stamp." To the same effect, *State v. Shields*, 112 Iowa, 27, 83 N. W. 807. In *John v. State*, 23 Wis. 504, it was held that an unstamped instrument which the statute required to be stamped was void, and could not be the subject of forgery, but this case was expressly overruled by that



of *State v. Hill*, 30 Wis. 416, wherein it was said: "The first question to be considered is, whether the omission from the information of an averment that the forged note was duly stamped is fatal to the information. No lengthy discussion of this question is necessary. In *John v. State*, 23 Wis. 504, it was held that an indictment was bad which charged the forging of a draft, and purported to set out the draft in full, but did not contain an averment that the same was stamped. This decision is founded on the assumption that an unstamped draft is void under the act of Congress. But we have had occasion to review that decision in three cases which have since been before us, and, following and adopting the doctrine of many adjudged cases in the state and federal courts, we have reached the conclusion that an unstamped draft, note, or other instrument which the act of Congress requires to be stamped is not void for want of a stamp, but is a valid instrument, unless it shall be made to appear by evidence that the stamp was fraudulently omitted, and that therefore the case of *John v. State*, was erroneous. We conclude, therefore, that the information is not bad by reason of the omission of an averment that the note was stamped, and so advise the circuit court": *Hill v. State*, 30 Wis. 419. While, as has been stated, it is a universal rule that the crime of forgery may be committed by forging an unstamped instrument or an indorsement thereon, the rule is also universal that the forged instrument, though unstamped, may be used as evidence against the person charged with committing the forgery: *People v. Frank*, 28 Cal. 507; *State v. Young*, 47 N. H. 402. Thus, on a trial for forgery under an indictment which sets out in haec verba the alleged forged instrument, it is no objection to the admission of such instrument in evidence that it was not stamped with a revenue stamp as required by the act of Congress: *Williams v. State*, 126 Ala. 50, 28 South. 632; *Horton v. State*, 32 Tex. 80; *State v. Shields*, 112 Iowa, 27, 83 N. W. 807.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**GEORGIA.**

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**HUDSPETH v. HALL.**

[113 Ga. 4, 38 S. E. 538.]

**MONOPOLY—PUBLIC POLICY.**—The creation or encouragement of a monopoly is against public policy.

**PUBLIC FERRIES—FRANCHISE—JUDICIAL INTERFERENCE.**—The action of county commissioners in granting a franchise to operate a public ferry, if done within the scope of their duties and discretionary power, cannot be interfered with by the courts, merely because such action is inexpedient and unwise, unless fraud or corruption is shown.

**PUBLIC FERRY—APPLYING FOR FRANCHISE.—A JUDICIAL RULING** that a private person who owns land on both sides of a river cannot establish a public ferry without a grant from the proper county authorities, will not prevent such person from thereafter applying for and securing a grant authorizing him to maintain such a ferry.

Bower & Bower and Hawes & Hawes, for the plaintiff.

D. H. Pope & Son, A. S. Johnson, and Benton Odom, for the defendants.

<sup>4</sup> **LUMPKIN, P. J.** This case was before this court at its March term, 1900: See *Hudspeth v. Hall*, 111 Ga. 510, 36 S. E. 770. As appears from the opinion delivered by Mr. Justice Little, the litigation in the trial court had resolved itself into a controversy between Mrs. Hudspeth and R. L. Hall concerning the right of the latter to operate a ferry over Flint river, at a point a short distance below that at which she had established a public ferry. He contended that, as he was the <sup>5</sup> owner of the land on both sides of the river at the point in question, he had a right to conduct a ferry for the accommo-

dation of the public, notwithstanding he had not been granted a franchise which authorized him so to do. We held to the contrary, and affirmed the judgment of the lower court, with direction that the trial judge so amend his order granting an injunction as to afford Mrs. Hudspeth full protection of the premises. Our decision was rendered July 13, 1900. On July 28th, R. L. Hall joined with W. H. Hall in presenting to the board of county commissioners of Baker county a petition, in which they represented themselves to be the owners of "the land on both sides of the Flint river, about two hundred yards below the ferry operated by Mrs. Hudspeth, in the town of Newton, in said county," and in which they stated that they were "desirous of establishing a public ferry across said river on said lands" at a point "about two hundred yards below the ferry of said Mrs. Hudspeth." They also in their petition expressed the belief that "the establishment of said ferry would be of great utility to the people of both Baker and Mitchell counties," and upon this ground applied for "a ferry franchise" authorizing and empowering them to "establish and operate a public ferry across said river at said place for the full term of ten years from" the date last mentioned. On the same day, the board of county commissioners met, passed upon this petition, and granted the franchise therein applied for. Subsequently the board, at the instance of petitioners, passed a further order in terms authorizing them to maintain a "public free ferry" at the point above designated. Stirred into renewed activity by the result of these proceedings, Mrs. Hudspeth filed an amendment to her original petition, wherein she charged that, for various reasons assigned, the franchise applied for by R. L. and W. H. Hall had been improvidently granted, and in which she prayed, among other things, that they be enjoined from exercising the same. This amendment was met by an answer whereby they took issue with Mrs. Hudspeth as to the propriety of affording her the relief she sought. At the interlocutory hearing had upon this new phase of the case, his honor of the trial bench passed an order enjoining the defendants "from opening or operating any kind of a ferry on or over the lands of" Mrs. Hudspeth, which were adjudged to "extend two hundred and ten yards from the center of the public road, where is established her ferry to the south, on the east side of Flint river," and further enjoining them "from running any private ferry within three miles of" her ferry. An injunction any more sweeping in its operation his honor declined to grant. Not satisfied with this outcome, Mrs.



Hudspeth sued out a bill of exceptions to this court, and again appears before us as a plaintiff in error.

1. Her chief cause of complaint appears to be that the court below refused to grant the injunction for which she prayed, notwithstanding "the undisputed evidence showed that plaintiff's facilities were ample and all-sufficient at her ferry to accommodate the whole public, and more, too, and that another in that vicinity was not a public necessity, nor a public convenience, in the sense that conveniences is meant in the law." In this connection, she contends that as "there was no public necessity for such other ferry," and as she "had expended large amounts of money to equip her said ferry for the purpose of accommodating the public," the "county authorities had no right to afterward render her property valueless by granting another franchise to another person to establish a public free ferry so near to" her ferry as to render the operation of the same unprofitable. She furthermore undertakes to call in question the expediency of the action taken by the county commissioners in granting a franchise to operate "a public free ferry at a place where," as the undisputed evidence showed, "there was no public highway—no public road leading to or from said ferry"; especially in view of the fact that the evidence did not disclose "any intention to establish a public road or highway to and from defendants' ferry." From the foregoing explanation of the position taken by Mrs. Hudspeth with regard to the franchise granted by the county commissioners, it will be perceived that she does not attempt to attack their action as ultra vires, or to question their good faith in the premises. Indeed, she relies wholly upon her contention that they did not act wisely or advisedly in the matter, since, as she ventures to assert, there was really no public necessity for establishing a ferry at the point chosen, or elsewhere in that vicinity. We shall deal with the case accordingly. If, for any reason, the grant of ferry privileges to the defendants was void, her right to collaterally attack it upon that ground admits of no doubt. If, on the other hand, the county authorities had power, in their discretion, to grant such a franchise, Mrs. Hudspeth cannot, in her capacity as owner of a public ferry, be heard to complain of their action; for, as is evident, she held <sup>7</sup> no exclusive privilege of conducting a ferry, and if "injured by the establishment and maintenance of another public ferry" in conformity to law, she could claim no right to recover damages, because she would, at least in legal contemplation, sustain none. This much was definitely settled when the

case made its first appearance before us: See volume and page of Georgia Reports above cited. As the writer observed in the case of *Keen v. Mayor etc.*, 101 Ga. 592, 29 S. E. 42, "the law recognizes in no one a right to create or maintain a monopoly." On the contrary, the creation or encouragement of a monopoly is opposed to public policy: *Atlanta v. Stein*, 111 Ga. 789, 36 S. E. 932. It would, therefore, be idle to say that the county authorities owed Mrs. Hudspeth any legal duty of shielding her against the inevitable consequences of legitimate competition: See *Railroad Co. v. Ellerman*, 105 U. S. 174, cited approvingly in *Keen v. Mayor etc.*, 101 Ga. 592, 29 S. E. 42. Clearly, their duty was to serve, not Mrs. Hudspeth in her capacity as owner of a ferry, but the public; and it follows that official action in the premises looking solely to the welfare of the community at large was eminently proper. Furthermore, even upon the assumption that she had any standing in court upon the theory that her property rights were invaded by the action taken by the county commissioners, it is evident that she did not make out a case entitling her to the relief sought. The evidence introduced on the hearing below leads, we think, irresistibly to the conclusion that the opposition free ferry will prove itself a great public utility and convenience. Conceding, however, for the sake of the argument, that the granting of a franchise to operate this new ferry was lamentably inexpedient and unwise, judicial intervention upon this ground alone would be wholly without justification. The law is well settled that where public officials "are acting within the scope of their duties and exercising a discretionary power, the courts are not warranted in interfering, unless fraud or corruption is shown, or the power or discretion is being manifestly abused to the oppression of the citizen": *Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. 509. To the same effect, see *Hamrick v. Rouse*, 17 Ga. 56; *State v. Woody*, 17 Ga. 612; *Semmes v. Columbus*, 19 Ga. 471; *Wells v. Atlanta*, 43 Ga. 67; *Allen v. Tison*, 50 Ga. 374; *Danielly v. Cabaniss*, 52 Ga. 212; *Mayor of Americus v. Eldridge*, 64 Ga. 524, 527, 37 Am. Rep. 89; *Southern Min. Co. v. Lowe*, 105 Ga. 352, 356, 31 S. E. 191; *Atlanta v. Stein*, 111 Ga. 789, 36 S. E. 932.

§ 2. There is even less merit in the further contention of the plaintiff in error, that the decision rendered by this court when the case was before us at the last term stood in the way of defendants securing a grant authorizing them to conduct a public ferry at the place designated in the application which they addressed to the board of county commissioners. We merely

ruled that, without a grant from the proper county authorities, a ferry such as that R. L. Hall claimed he had a right to establish could not lawfully be conducted, at that or at any other point on the river, to the prejudice of Mrs. Hudspeth. We certainly did not undertake to in any manner disenfranchise him, or to even question his right, pending the litigation in the trial court, to exercise his privilege as a citizen and land owner to apply for and secure a grant authorizing him to maintain a public ferry at the point in controversy. There was ample testimony to warrant the conclusion that the new ferry was not located upon Mrs. Hudspeth's land.

It may be remarked, before concluding, that in the brief filed in behalf of the plaintiff in error, counsel suggest several other reasons why, in their opinion, the trial judge should have granted the injunction prayed for. We have with much interest, if not with equal profit, read all they have to say in this connection; but as none of the questions thus sought to be raised are presented by the bill of exceptions, we cannot, of course, with propriety undertake to deal with them.

Judgment affirmed.

All the justices concurring.

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**Monopoly.**—Whatever tends to create a monopoly, and to prevent competition between those engaged in a public employment or business impressed with a public character, is opposed to public policy: *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 22 N. E. 798.

**Franchise.**—On the power of a municipality to grant an exclusive franchise, see *Long v. Duluth*, 49 Minn. 280, 32 Am. St. Rep. 547, 51 N. W. 913.

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## WILKINS v. GIBSON.

[113 Ga. 31, 38 S. E. 374.]

**SUBROGATION—WHEN ARISES.**—Subrogation arises only in those cases where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay, or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor.

**SUBROGATION—LENDER, WHEN GIVEN A FIRST LIEN.**—One who advances money to pay off an encumbrance upon



realty, at the instance of the owner thereof, and upon the express understanding that the advance made is to be secured by the immediate execution of papers which will constitute a first lien on the property, is not a mere volunteer. If the new security is defective, the lender, if not chargeable with culpable negligence, will be subrogated to the rights of the prior encumbrancer under the security held by him, unless the superior or equal equities of others will be prejudiced thereby.

**SUBROGATION—KNOWLEDGE OF INTERVENING ENCUMBRANCE.**—The fact that one who loans money to satisfy a prior mortgage knows of the existence of an intervening mortgage will not defeat his right to subrogation, if he had an agreement to that effect.

**SUBROGATION — INTERVENING ENCUMBRANCE — EQUITABLE ESTOPPEL.**—When a prior encumbrance has been canceled of record, and, acting on the faith of this, an intervening encumbrancer has delayed in prosecuting his legal remedies, while these facts do not estop a person advancing money to pay off the prior encumbrance from claiming subrogation, yet if he delays for an unreasonable time to claim the right and have the cancellation set aside, equity will refuse to enforce the right of subrogation.

**SUBROGATION.—IF A SENIOR MORTGAGE IS PAID OFF BY A JUNIOR MORTGAGEE,** he will, if the payment was necessary for his protection, be subrogated to the rights of the senior encumbrancer.

**SUBROGATION—ENTIRE DEBT PAID.—TO ENTITLE A JUNIOR MORTGAGEE** to subrogation, the general rule is that the whole debt must be paid and the senior creditor satisfied.

**SUBROGATION — JUNIOR ENCUMBRANCER PAYING DEBT.**—If the entire prior encumbrance is paid, a junior encumbrancer is entitled to subrogation to the extent of the amount he contributed, though the balance of the debt is paid by the debtor or by a third person.

**SUBROGATION—WAIVER—ENFORCING SUBSEQUENT MORTGAGE.**—One who advances money to pay a prior encumbrance, and takes a mortgage as security with the understanding that it is a first lien on the property, does not, by suing to enforce his mortgage, waive his right of subrogation, where the necessity of claiming such right was not known until an effort was made to enforce the mortgage.

**USURY.—THE BURDEN OF PROVING** that a transaction is infected with usury lies upon him who attacks it.

**USURY—PROOF OF.**—A transaction is not shown to be usurious merely because the amount loaned is less than the debt secured.

**SUBROGATION—USURY, EFFECT OF.**—The fact that one, who has loaned money to discharge a prior encumbrance, has charged usury, will not deprive him of the right to be subrogated to the rights of the prior encumbrancer, if he had an agreement to that effect, and is not seeking to collect more than the principal and legal interest of his debt.

**MORTGAGE LIEN—RENTS AND PROFITS OF PROPERTY—DEPRECIATION.**—A senior lienholder, whose claim is secured by property which, by depreciation in value after the debt was contracted, becomes worth less than the debt, has an equitable claim upon the rents and profits of such property so far as needed to pay his debt.

**MORTGAGE LIEN — ENFORCING — RENTS — PLEADING — AMENDMENT.**—One who seeks to enforce a mortgage lien against property, which through depreciation has become worth less than the debt, may amend his complaint so as to claim the rents and profits of such property, and such amendment does not add a new cause of action.

**EXECUTORS AND ADMINISTRATORS—SUITS AGAINST —JUDGMENT.**—When one is sued as executor or administrator, he must so plead as to protect himself from individual liability, and any judgment obtained is conclusive on both parties as to all questions which were raised in the pleadings or which could properly have been raised therein.

**SUBROGATION—JOINDER OF PARTIES—PLEADING.**—One who claims the right of subrogation to the rights of a prior encumbrancer as against an intermediate one, must, to enforce such right, make such prior encumbrancer a party to the action, or allege a sufficient reason for not doing so, and set up the rights of such prior encumbrancer so as to allow others to make proper defenses thereto.

J. R. Lamar, E. H. Callaway, Callaway & Fullbright, and S. H. Sibley, for Wilkins et al.

R. O. Lovett, Ellis & Ellis, and Lawson & Scales, contra.

<sup>33</sup> COBB, J. On October 30, 1893, Mrs. Wilhelmina I. Steiner executed and delivered to John P. Gibson a security deed, under the provisions of section 1969 et seq. of the code of 1882, to a certain described tract of land, to secure a debt of \$6,000 due the grantee, who gave to the grantor a bond conditioned to reconvey the property upon payment of the debt. This deed was duly recorded on November 28, 1893. The debt referred to in the deed was for a loan of money for which a written application had been made by Mrs. Steiner to Lawson & Scales, it being stated therein that the debt was to bear interest at eight per cent payable annually, the principal debt being payable in ten annual installments. The applicant also stated that the loan requested was to be used to pay off a mortgage held by A. L. Richardson, and, in effect, that there were no other encumbrances on the property which she proposed to give as security for the loan. An abstract of the title prepared by Lawson & Scales, attorneys at law, shows that there were no other liens than the mortgage held by Richardson outstanding against the property. In a certificate attached to the abstract these attorneys state that the land would be subject only to the security deed given to Gibson. The debt became due <sup>34</sup> on account of the same not having been paid in accordance with the contract, and Gibson filed his petition against R. C. Neely, administrator of the estate of Wilhelmina I. Steiner, who had died

since the execution of the deed, to recover judgment on the notes which the deed was given to secure. Having recovered such a judgment, which was declared to be a special lien on the land, execution was issued thereon on May 28, 1896, and the same having been levied on the land described in the security deed, a claim was interposed to the property by Wilkins, Neely & Jones. Pending the trial of the claim case, on September 14, 1897, Gibson, the plaintiff in execution, filed an equitable petition against Wilkins, Neely & Jones, the claimants, R. C. Neely, as administrator of the estate of W. I. Steiner, deceased, and Charles A. Scudder, the substantial averments of which are as follows:

On February 23, 1889, Wilhelmina I. Steiner executed and delivered certain promissory notes, dated that date and due five years thereafter, aggregating \$9,068.90, to A. L. Richardson of New Orleans, Louisiana, and for the purpose of securing the payment of these notes at maturity executed and delivered to Richardson a security deed under the provisions of section 1969 of the code of 1882, conveying a certain described tract of land. On November 19, 1890, W. I. Steiner executed to Wilkins, Neely & Jones a mortgage deed covering the property described in the deed to Richardson, to secure an alleged indebtedness of \$5,000, a clause in the mortgage reciting that it is made to secure any general or special balance due or that may at any time become due, as cumulative or additional security, and does not affect any other security already given. On February 11, 1891, W. I. Steiner executed and delivered to Wilkins, Neely & Jones a mortgage for the sum of \$6,000, covering the same debt and property as the foregoing instrument; this mortgage also reciting that it was given to secure any general or special balance due or that might become due to the mortgagees. As a matter of fact, this mortgage represented the same debt, and was taken in lieu of and in extinguishment of the instrument dated November 19, 1890. The paper dated February 11, 1891, appears of record to have been marked canceled and satisfied on November 10, 1891. On November 6, 1891, W. I. Steiner executed and delivered to Wilkins, Neely & Jones a mortgage for the sum of \$6,000, covering a large amount of personal property; this mortgage <sup>35</sup> also reciting that it was given to secure any general or special balance due or which might become due. This mortgage was by Wilkins, Neely & Jones marked canceled and satisfied on June 18, 1892. On June 17, 1892, a similar mortgage was given this firm, to secure \$6,580.41, which sum



included all the indebtedness of W. I. Steiner, the mortgage containing a similar recital to the foregoing. It was canceled of record February 10, 1893. Subsequently, the notes given by W. I. Steiner to A. L. Richardson having become due, she applied to Lawson & Scales, loan brokers, and engaged said firm to negotiate a new loan in order that she might pay up and discharge her indebtedness to Richardson, who was urging a settlement of the same. Upon being informed that no new loan could be secured if there were any existing or uncanceled liens against the property offered as security, W. I. Steiner, knowing that subsequently to the deed to Richardson such liens had been given Wilkins, Neely & Jones, immediately applied to them to assist her in perfecting the necessary arrangement to secure the new loan. To this they readily consented, and, being anxious that Mrs. Steiner should make arrangements with Richardson so that she could continue her farming operations, out of which they hoped to realize their debt, accompanied W. I. Steiner's husband, who was acting for her, to the office of Lawson & Scales, and in the presence of the members of this firm stated that they thought all their liens on the property had been canceled, but if they were not, they would promise and agree to cancel and extinguish all their liens on the property in question, if Lawson & Scales would negotiate the loan for Mrs. Steiner. Upon the faith of this agreement, and upon the assurance of Wilkins, Neely & Jones that they held no liens or other papers against the property, application was made for a loan of \$6,000, the same being sufficient to pay the debt due Richardson, which amount was advanced by petitioner to W. I. Steiner and by her paid to Richardson in extinguishment of his debt, and his deed was then and there marked canceled and satisfied upon the record, the debt due petitioner being secured by a security deed under section 1969 et seq. of the code of 1882, which deed was dated October 30, 1893, and recorded November 30, 1893. After the consummation of the loan and the execution of the deed, Wilkins, Neely & Jones, having full knowledge of the deed, in pursuance of their previous intention and understanding, in order to secure an <sup>36</sup> alleged indebtedness to them, caused W. I. Steiner to execute and deliver to them, on May 1, 1894, a mortgage to secure the payment of \$9,806.90, covering the same property as that described in the deed to petitioner.

The petition further alleged that at the December term, 1896, of Burke superior court, upon a suit on the notes secured by deed a judgment was rendered in favor of petitioner against R.

C. Neely, administrator of W. I. Steiner, deceased; upon which judgment execution was issued, and, after a reconveyance by petitioner, the same was levied upon the property conveyed to petitioner, against which he obtained a special judgment; to which levy a claim was interposed by Wilkins, Neely & Jones, and the same is now pending. Petitioner, upon investigating the basis of said claim, finds to his surprise that the record discloses no actual cancellation of the paper dated November 19, 1890, from W. I. Steiner to Wilkins, Neely & Jones, but which he asserts has in equity and good conscience been canceled so far as his rights and the priority of his existing judgment is concerned. W. I. Steiner having died, Wilkins, Neely & Jones, claiming to be large creditors, applied for letters of administration on her estate, through one of the members of their firm, R. C. Neely, who was duly appointed and qualified on November 5, 1894. On June 3, 1895, R. C. Neely, as administrator aforesaid, obtained from the court of ordinary leave to sell the equity of redemption in the land now levied upon, subject to an alleged indebtedness to the firm of which he was a member of \$5,000 and the debt due petitioner of \$6,000. On July 2, 1895, the equity of redemption was exposed to sale and knocked off to Charles A. Scudder, a son in law of Wilkins and brother in law of both Neely and Jones, at and for the nominal and inadequate consideration of \$5. While the property was bid off in the name of Scudder, petitioner charges that it was in pursuance of an arrangement made by him and Wilkins, Neely & Jones, in order that they might obtain possession of the premises and reap the benefits of the rents, issues, and profits of said place, without accounting for the income, thus enabling them, should their mortgage deed be sustained, to compel petitioner to pay the amount of the alleged indebtedness of W. I. Steiner to them as it stood at the date of sale of the equity of redemption, without giving credit for the actual amounts received by them, which in law and equity <sup>37</sup> should be credited on their claim if it had priority of law. Scudder was a nominal party to the transaction, Wilkins, Neely & Jones being the real purchasers at the sale, and they have since exercised all rights of ownership. Petitioner alleges that at the time of the pretended sale of the equity of redemption there was no salable title in the estate of W. I. Steiner, and that the purchaser could acquire no title or interest in the property or its income that would militate against the rights of the petitioner in the enforcement and collection of his debt. The administrator has made no returns

for the years 1896 and 1897, and has made no accounting as to what he has done with the proceeds of the sale of the perishable property or of the annual income of said property since his administration down to the present time; and even if the deed under which Wilkins, Neely & Jones claim is prior in law to the claim of petitioner, he alleges that, upon a proper accounting between the administrator and the claimants, all the indebtedness of W. I. Steiner to Wilkins, Neely & Jones would have been fully paid off and discharged. By accepting the administration on the estate of the deceased the administrator took possession of the tract of land levied on, and also of all other property belonging to the deceased, and held the same in trust for the benefit of creditors and heirs; and having accepted this trust, he and the firm of which he is a member are in law and equity estopped from setting up any title in himself or them adverse or antagonistic to the title of his intestate.

The prayers of the petition were: 1. That the pending claim be enjoined and stayed until the matters set up herein are adjudicated and determined; 2. That the lien of his judgment under his said notes and deed aforesaid be decreed to be superior in rank and dignity to all the liens or titles set up by claimants, and that the property levied on be declared subject to his *fieri facias*; 3. That Wilkins, Neely & Jones be required to specifically perform their agreement as to cancellation of their liens, and that the mortgage dated November 19, 1890, be delivered up and canceled; 4. That the pretended sale of the equity of redemption in the property levied on be declared null and void; 5. That claimants be decreed to be estopped from setting up any title adverse to the title of W. I. Steiner, deceased; 6. That R. C. Neely, as administrator, be required to account fully and specifically for all assets that have come into his hands, and particularly of the sale of personal property, and <sup>3s</sup> the rents, issues, and profits of the property from the date of his administration down to the present time; that R. C. Neely, as administrator, and Wilkins, Neely & Jones be required to account and show the true indebtedness of W. I. Steiner to Wilkins, Neely & Jones, and what payments or credits, if any, have been made by the administrator on the debt, and what amounts have been received by Wilkins, Neely & Jones, collectively or individually, from the rents, issues, and profits of the property, both before and after the pretended sale of the equity of redemption; 7. That the court decree that the cancellation of the mortgage dated February 11, 1891, be a cancellation and satisfaction of



the prior one, dated November 19, 1890; 8. For general relief and process. When the claim case was called for trial, plaintiff in execution moved to amend the pleadings so as to enlarge the issues, and set up the following matters as ancillary to his right to condemn the land in controversy: The estate of W. I. Steiner is insolvent, and plaintiff and claimants are her only creditors. The fieri facias levied is proceeding to enforce a judgment founded on a debt secured by deed to the land levied on, which deed was made by W. I. Steiner in 1893. At the time this deed was made W. I. Steiner was indebted to A. L. Richardson in the sum of \$5,598, and Richardson held title to the land levied on as security for the sum due him by Mrs. Steiner. Of the sum of \$6,000 loaned by petitioner to Mrs. Steiner in 1893, \$5,598 was paid by petitioner to Richardson on the notes he held against Mrs. Steiner. This payment was made at the request of Mrs. Steiner, and her purpose in procuring the loan was to pay the notes held by Richardson. On account of the facts aforesaid, the plaintiff in fieri facias is subrogated to all rights and priorities that Richardson had at that time, and is in equity and right the legal assignee of the security held by Richardson for the amount paid to Richardson and the interest thereon. Claimants knew of the application of Mrs. Steiner for a loan and the purpose for which it was to be used, and urged her to procure the loan, as it would be of advantage to the claimants as junior creditors of Mrs. Steiner. Plaintiff alleges that Wilkins, Neely & Jones did not furnish any credit to Mrs. Steiner by reason of the fact that the Richardson deed was canceled of record. Their status as creditors was not changed by reason of the cancellation. The debt for which they claim to hold the deed as security was contracted prior to the cancellation of the Richardson deed, for which reason they <sup>39</sup> have in law and equity no right to the land as against petitioner's judgment. Plaintiff prays, therefore, that the land be declared subject to his fieri facias for the amount he paid to Richardson, in the event it is not declared subject to the fieri facias as it now stands, which plaintiff claims as his legal right. Claimants objected to the allowance of this amendment, and moved the court to require the plaintiff to elect whether he would proceed under the levy, or would have the case tried under the equitable petition. The court refused this motion and allowed the amendment; and to this ruling the claimants filed exceptions pendente lite, contending that the plaintiff was not entitled, under the facts alleged in the amend-

ment, to the relief prayed for, that the amendment constituted a new cause of action, and that plaintiff was not entitled, under the facts alleged, to be subrogated to the rights of Richardson.

The claim case and the equitable proceeding having been, by direction of the court, consolidated and ordered to be tried together, Wilkins, Neely & Jones insisted on a demurrer previously filed to the equitable petition, which contained the following grounds: 1. There is no equity in the petition; 2. The petition sets forth no cause of action; 3. There is a misjoinder of parties defendant; 4. There is a misjoinder of causes of action; 5. The petition is not verified, notwithstanding it prays for injunction; 6. The petition is not sanctioned, although it prays for injunction. The court sustained the demurrer as to the third and fourth grounds, and struck all the allegations as to the sale of the equity of redemption to Charles A. Scudder. To the failure of the court to sustain the other grounds of the demurrer the defendants assign error in their *pendente lite* exceptions above referred to. Subject to their demurrer, Wilkins, Neely & Jones filed an answer which, in substance, alleged W. I. Steiner transferred to them the bond for titles given her by Richardson, and under this bond and the instrument executed November 19, 1890, they hold the titles to the land levied on, and they deny that this instrument has ever been canceled or extinguished. They deny all of the allegations of the petition with reference to an agreement on their part to cancel their liens if plaintiff would advance the money to pay the Richardson debt, and deny that they stated that they thought all their liens had been canceled. They had no knowledge of the negotiations for the loan, or of the conveyance by Mrs. Steiner to plaintiff until <sup>40</sup> after the death of Mrs. Steiner. They deny that the equity of redemption was sold for an inadequate consideration, and aver that it was utterly valueless. They aver that the sale was at public outcry, and was fairly conducted. It is alleged that in the suit on the notes instituted by plaintiff against R. C. Neely as administrator of W. I. Steiner, Neely submitted his accounts, including the amount received by him from the sale of the equity of redemption, in his plea of *plene administravit præter*; that this plea was found in favor of Neely; and for this reason the matters set up in the petition in relation to the purchase of the equity of redemption and the conduct and management of the sale are *res adjudicata*, and petitioner is estopped from attacking the same. And defendants claim that their rights under the instrument dated November

19, 1890, and under the transferred bond for titles, are superior to the rights of the plaintiff under his deed and the judgment rendered on the notes secured by the deed. They pray for a decree establishing these rights. By an amendment to their answer, these defendants set up that they advanced various sums to Mrs. Steiner to be applied upon the debt due Richardson, both before and after the date of their security executed on November 19, 1890, and they pray that they may be subrogated to the rights of Richardson to the extent of the sums so advanced. Charles A. Scudder answered the petition, denying generally all the material allegations of the same. In addition to these answers, there appears in the record an answer of R. C. Neely, as administrator, to the original suit on the notes held by the plaintiff, in which answer Neely sets up that he had fully administered all of the assets of the estate of Mrs. W. I. Steiner which came into his hands, except certain property of small value; and he attaches to his answer a copy of his account with the estate, showing receipts and expenditures.

The trial resulted in a verdict for the plaintiff against the land for \$5,598.00, with interest at seven per cent from October 30, 1893. The defendants filed a motion for a new trial, and, pending the hearing of this motion, the plaintiff sued out a bill of exceptions to this court, complaining that the trial court erred in sustaining certain grounds of the defendants' demurrer to the petition, and in striking a portion of the petition. These exceptions came before this court at the October term, 1899 (*Gibson v. Wilkins*, 110 Ga. 93, 35 S. E. 316), and the points raised were not decided, but leave was granted to withdraw the bill of exceptions <sup>41</sup> and file it in the court below as exceptions pendente lite, with the right in the plaintiff to avail himself of his exceptions after the motion for a new trial was heard and determined. Three questions were submitted to the jury by the court: 1. Whether the security deed held by Wilkins, Neely & Jones had been canceled and satisfied of record by a novation in taking mortgages on the same property; 2. If the mortgages to Wilkins, Neely & Jones, subsequent to the deed relied on by them, did not constitute a novation, whether they had agreed that, if the money was advanced by Gibson for the purpose of paying off the Richardson debt, they would waive their claim as against Gibson's debt; 3. Whether Gibson was subrogated to the rights of Richardson, on the theory that he had paid the money with the understanding that he was to have a first lien on the property. The jury found in favor of the de-



fendants on the question of novation, and that they had not agreed to waive their rights as against Gibson, but found in favor of Gibson on his claim of subrogation. The defendants' motion for a new trial assigns error upon the admission of certain evidence upon various specified portions of the charge, and upon the failure of the court to give in charge various requests. The motion was overruled, and they excepted, assigning as error the overruling of the motion and the rulings complained of in their exceptions pendente lite. The plaintiff in a cross-bill of exceptions has brought to this court the assignments of error in the main bill brought to the October term, 1899, wherein he complains of the action of the court in sustaining certain grounds of the defendants' demurrer to the equitable petition, and the striking of certain portions thereof, and of the refusal to allow the amendment offered in the claim case in its entirety. The cross-bill brings under review the ruling of the court, in sustaining those grounds of the demurrer, that there was a misjoinder of parties defendant and of causes of action. The effect of the action of the court was to eliminate from the case all claims and charges in relation to the sale of the equity of redemption, and also all claims and demands for an accounting by the defendants for the rents, issues, and profits received from the land after the alleged pretended sale of the equity of redemption. The record is voluminous, and the facts of the case complicated. We shall, however, endeavor to deal with all of the material questions arising in the case. As the jury found in favor of the defendants on the issues <sup>42</sup> as to novation and estoppel, it will be unnecessary to advert to those branches of the case. On these the evidence was directly conflicting, and we shall assume, for the purposes of this opinion, that the jury have arrived at the truth of the case with respect to them.

1. The doctrine of subrogation has for a long time been applied by courts of equity. It was borrowed from the civil law, and was of two kinds: The legal subrogation, which took place as a matter of equity without any agreement to that effect made with the person paying the debt; and the "conventional subrogation," which was applied where an agreement was made with the person paying the debt that he would be subrogated to the rights and remedies of the original creditor: See Howe's *Studies in Civil Law*, 155. Courts of equity in this country have applied the doctrine in favor of sureties who pay off the debts of their principals (24 Am. & Eng. Ency. of Law, 1st ed., 194; Sheldon on Subrogation, 2d ed., sec. 86; Harris on Subrogation,

sec. 162) ; as well as in favor of any person having an interest in property upon which there is a lien, and who, to protect that interest, pays off such lien: 24 Am. & Eng. Ency. of Law, 1st ed., 248; Sheldon on Subrogation, 2d ed., sec. 3; Harris on Subrogation, sec. 795. The extent to which the doctrine of subrogation has been expressly recognized by the law-making power in this state may be seen by reference to the following sections of the Civil Code: 2986, 2995, 2996, 5433, 5471. The doctrine has also, from the very first, been applied in favor of a person who, though having no interest in the property necessary to be protected, yet pays off the lien upon an agreement that he is to be subrogated to the rights of the lienholder: 24 Am. & Eng. Ency. of Law, 1st ed., 290, and cases cited; Sheldon on Subrogation, 2d ed., sec. 248. According to these authorities, this agreement may be made with the person paying the debt by either the creditor or the debtor: See, also, in this connection, *Allen v. Caylor*, 120 Ala. 251, 74 Am. St. Rep. 31, 24 South. 512. The doctrine has been recently applied by this court in such a case: *Merchants' Bank v. Tillman*, 106 Ga. 55, 31 S. E. 794. It is, however, never applied for the benefit of a mere volunteer. "The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or property of his own": Sheldon on Subrogation, sec. 240.

<sup>43</sup> In a case where a stranger pays off the debt of another which is secured by deed or mortgage, the parties have a right to agree that the payor will have the same priority as the holder of the security, and be substituted for him. A court of equity will enforce this agreement as made, and give the second creditor just such security as he contracts for. If he is content to take an inferior lien and rely on that to enforce payment of his debt, the court will not, in the absence of an agreement for subrogation, come to his relief and subrogate him to the rights of the holder of the original security. Consequently, if the second creditor pays the debt without taking an assignment of the security, and without any agreement, either actual or implied, that the security is to be kept alive for his benefit, and takes a new security, it will be subject to any valid intervening liens which may have been created by the debtor on the property, notwithstanding the former might have been paid the debt by request of the debtor and without any knowledge of the existence of the

intervening liens. If in such a case the lender desires to be subrogated to the rights of the original creditor, he must make a distinct agreement to that effect. The law will not imply an agreement from the bare fact that the money was paid by request of the debtor. When the first security is paid off, its lien is discharged, and the equitable doctrine of subrogation cannot be invoked to revive it in favor of a person who had no interest in paying the debt, and who did so without any agreement that he would be substituted for the original creditor. By operation of law, as soon as this lien is discharged, the lien next in dignity takes its place, and for equity to give another creditor priority over such a lienholder, when perhaps the debtor's purpose in discharging the first lien was to give him the preference, would be manifestly unjust. In any case the burden is on the person paying off the lien to show an agreement, or a state of facts from which an agreement would be implied, to substitute him for the original creditor. And to properly carry this burden he must show an agreement clear and unequivocal, or a state of facts from which such a one will be implied. Such we understand to be the rules recognized and applied by at least a majority of the courts of this country. In Sheldon on Subrogation, section 248, we find the following: "It has been said that whenever a payment is made by a stranger to a creditor in the expectation of being substituted to the place of the creditor, he is entitled to such substitution. <sup>44</sup> But the doctrine generally adopted, and that of these very cases when limited to the point actually decided, is that a conventional subrogation can result only from a direct agreement, express or implied, made with either the creditor or the debtor, and that it is not sufficient that a person paying the debt of another should have merely the understanding on his part that he is to be subrogated to the rights of the creditor, though if the agreement has been made a formal assignment will not be necessary." The law is thus stated in 24 American and English Encyclopedia of Law, first edition, 290, 291: "In order that one having no interest to protect, who pays the debt of another or advances money for the purpose, may be entitled to succeed to the rights and remedies of the creditor in respect of the debt so paid, there must be a convention or agreement to that effect." "Conventional subrogation, as its name imports, results from the agreement of the parties, and can take effect only by agreement": Bouvier's Law Dictionary, tit. "Subrogation." "Under the civil law it was said that the right would not pass to a stranger; that it was



a personal privilege. In order to pass the right to him, it would be necessary to do so by stipulation for such agreement": Harris on Subrogation, sec. 792. Indeed, this rule of the civil law required an absolute and express agreement for subrogation; and in Louisiana it is applied with so much strictness that the lender will not be entitled thereto unless he made an express agreement to that effect with the creditor, notwithstanding the debtor may have agreed to substitute the lender for the creditor: See Sheldon on Subrogation, sec. 250.

But it must not be understood that an agreement for subrogation will never be implied. In fact, there are loose expressions in some of the cases to the effect that if the advance is made at the request of one who has an interest in the lien to be discharged, an agreement for subrogation will be implied: See 24 Am. & Eng. Ency. of Law, 295, 296. But in many of the cases where these expressions occur the facts showed an actual agreement, and those few which can be properly treated as deciding the question are out of harmony with the weight of authority. As an instance of the former class, see *Sutton v. Sutton*, 26 S. C. 33, 1 S. E. 19; *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161. In *New Jersey etc. Ry. Co. v. Wortendyke*, 27 N. J. Eq. 658, certain persons, who had advanced money to pay off a debt contracted by the railroad company for rolling stock and locomotives, claimed to be subrogated to the rights of the <sup>45</sup> vendors, to the extent of the advancements made. In dealing with this contention, Mr. Justice Green said: "The case as here presented does not entitle the petitioners to a decree for subrogation. They do not, in their petition, claim to stand as guarantors on the contract, or that they were in any way held bound for its performance. They only allege that they made the advances with the understanding that they should be subrogated to the right of the owners of the rolling stock, to the extent of such advancements. I have been unable to find, either in the petition or evidence, anything to show an agreement with the original debtor or creditor, that these parties should be entitled to subrogation or to stand in the place of the vendors of the stock. It is not sufficient that a person paying the debt of another should do so merely with the understanding on his part that he should be subrogated to the rights of the creditor. Conventional subrogation can only result from an express agreement either with the debtor or creditor": Citing *Dixon on Subrogation*, 1, 10, 167; *Bouvier's Law Dictionary*, tit. "Subrogation"; *Sandford*

v. McLean, 3 Paige, 116, 23 Am. Dec. 773; Shinn v. Budd, 14 N. J. Eq. 234. In Watson v. Wilcox, 39 Wis. 643, 20 Am. Rep. 63, it was held: "One who, having no interest to protect, voluntarily loans money to a mortgagor for the purpose of satisfying and canceling the mortgage, taking a new mortgage for his own security, cannot have the former mortgage revived and himself subrogated to the rights of the mortgage therein." In Home Sav. Bank v. Bierstadt, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161, notwithstanding it was ruled, as stated above, that one who advanced money at the request of the debtor was not to be regarded as a volunteer, it appeared that there was an express agreement that the lender was to have a first lien on the property; and it was said in the opinion that "it is the agreement that the security shall be kept alive for the benefit of the person making the payment which gives the right of subrogation, because it takes away the character of a mere volunteer. Here the agreement between the debtor and the appellee, who advanced the money, was to the effect that appellee was to advance sufficient money to discharge the seven Goudy deeds of trust, and should receive from the debtor, by way of security for the money so advanced, a first mortgage upon the seven lots. In equity, that was an agreement that the Goudy deeds of trust should become security for her loan. That was the substance of the transaction, and equity will effectuate the real intention of the parties, where no injury is done to an innocent party, <sup>46</sup> by applying the principle of conventional subrogation." Probably, therefore, the language in another portion of the opinion with reference to money advanced by request is to be treated as qualified by the first part of the foregoing quotation. It was further ruled in that case, that even where the security paid off was canceled, equity would keep it alive for the benefit of the person paying the debt, provided he was not guilty of gross negligence, and where justice requires it. The supreme court of Texas has held that while an agreement for subrogation was necessary, it was sufficiently shown by a recital in a deed to the lender that he retained a first lien on the property: Mustain v. Stokes, 90 Tex. 358, 38 S. W. 758.

A case which, perhaps, leans too far the other way is that of Bohn Sash Co. v. Case, 42 Neb. 281, 60 N. W. 567. There it appeared that the lender, by express request and solicitation of the debtor, advanced him the money with which to pay off certain mortgages on his property, upon the assurance by the debtor that the lender was to have a first mortgage thereon.

There were other liens outstanding at the time, junior to the mortgages, but the lender was assured that these liens had been provided for. As a matter of fact they had not; and the supreme court of Nebraska held that the lender was not subrogated to the rights of the mortgagees in the discharged mortgages. In *Kocher v. Kocher*, 56 N. J. Eq. 545, 39 Atl. 536, it was held that: "Where a son loaned his father money with which to pay assessments which were a lien on a lot, he was not entitled to be subrogated to such lien." In the opinion the vice-chancellor said: "The right of subrogation must either arise out of the circumstance that the party paying or asking subrogation was interested in the property, and entitled to pay the encumbrance in order to protect himself, or he must have made the payment at the request of either the debtor or the lienor, with the understanding that he should be subrogated." In *Whiteselle v. Loan Agency* (Tex. Civ. App.), 27 S. W. 300, it was held, in effect, that subrogation arose in favor of a lender who advanced money to pay off a security under an agreement with the debtor that he was to have a first lien on the property pledged to secure the original debt. In *Seeley v. Bacon* (N. J.), 34 Atl. 139, Vice-Chancellor Reed, in referring to the claim of a person who had advanced money to pay off certain liens to be subrogated to the rights of the lienholders, said: "She claims that she should be subrogated to the rights of these mortgagees <sup>47</sup> to the amount which she had advanced for their payment. But the mere fact that she advanced \$3,500 with the intention that it should be used in the payment of these mortgages, coupled with the fact that this sum was so used, will not entitle her to subrogation. The right to subrogation which springs out of the mere fact of the payment of a debt, and which is termed 'legal subrogation,' exists only in favor of a surety for the payment of the debt, or one who is compelled to pay the debt to protect his own rights. Phoebe Munford stood in no such attitude when she paid this money. She must therefore, rely upon an agreement, existing at the time of the payment, with the mortgagor or mortgagee, that she should be subrogated to their liens. 'This is styled 'conventional subrogation.' It is entirely settled that one who advances money to pay a claim for the security of which there exists a lien, in default of an agreement, cannot be subrogated to the rights of the lienor. . . . Conventional subrogation can only result from an agreement either with the debtor or creditor." In *Heiney v. Lontz*, 147 Ind. 417, 46 N. E. 667, it was ruled, sub-



stantially, that one who advances money for the payment of an encumbrance, upon the promise merely of repayment, without any interest of his own to protect, and without promise of subrogation, and without fraud or imposition upon him, is not entitled to subrogation: See, also, *Small v. Stagg*, 95 Ill. 39; *Straman v. Rechtime*, 58 Ohio St. 443, 51 N. E. 44; *Wilson v. Wilson* (Idaho), 57 Pac. 708, 712; *Allen v. Caylor*, 120 Ala. 251, 74 Am. St. Rep. 31, 24 South. 512; *Henry v. Bounds* (Tex. Civ. App.), 46 S. W. 120, 122. We have undertaken to refer to only a few of the many cases dealing with this question. Those cited above are among the more recent decisions. Many of the earlier cases cited in the notes to 24 American and English Encyclopedia of Law, 281 et seq., will be found to be in point, some of them more nearly so even than some of those above cited.

It is true, as stated above, that some of the courts have extended the doctrine farther than those above referred to. It has been said that subrogation was a "benevolent" doctrine and equity would apply it in any case in which justice required it; and under sanction of this elastic expression cases can be found where it was applied without the semblance of an agreement. We think the safer and better rule to be, and we therefore hold, that subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would <sup>48</sup> be bound to pay, or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor: See *Aetna Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. Rep. 625.

For instances of a more liberal application of the doctrine, see the following cases: *Price v. Davis*, 88 Va. 939, 14 S. E. 704; *Emmert v. Thompson*, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; *Zell's Appeal*, 111 Pa. St. 532, 6 Atl. 107; *Gans v. Thieme*, 93 N. Y. 225; *George v. Butler*, 16 Utah, 111, 50 Pac. 1032; *Greishaber v. Farmer* (Ky.), 42 S. W. 742. In *Merchants' Bank v. Tillman*, 106 Ga. 55, 31 S. E. 794, cited above, the law with reference to the doctrine of conventional subrogation was thoroughly considered, and the conclusion was reached that "one who advances money to pay off an encumbrance upon realty, at the instance of the owner thereof, and upon the express understanding that the advance made is to be secured by the immediate execution of papers which will con-

stitute a first lien on the property, is not a mere volunteer; and in the event the new security thus taken turns out to be defective, the person parting with his money on the faith thereof, if not chargeable with culpable and inexcusable neglect in the premises, will be subrogated to the rights of the prior encumbrancer under the security held by him, unless the superior or equal equities of others would be prejudiced thereby." It appeared in that case that the debtor made an express agreement with the person who advanced the money to pay off the encumbrance that he should have a first lien on the property: See, also, *Mitchell v. Butt*, 45 Ga. 162; *Franklin v. Newsom*, 53 Ga. 580. An agreement of the character just referred to was held, in effect, to be an agreement that the second creditor was to be subrogated to the rights of the creditor whose debt had been discharged with the money advanced. Viewed in the light of the authorities, as well as in that of sound equitable principles, that decision is manifestly right. But further than that we are not prepared to go. Some of the extracts from the judge's charge were not in harmony with the rules above laid down, and consequently a reversal of the judgment refusing a new trial is necessary. As the case goes back for another hearing, it would not be profitable, if indeed it would be proper, to express any opinion on the evidence found in the present record, as facts may be adduced on another trial which will give the case an entirely different <sup>49</sup> aspect. Nor is it necessary to set out at length the portions of the charge which contain erroneous statements of the law. They will sufficiently appear from an application to the charge of the principles above laid down. The judge instructed the jury, in effect, that if the plaintiff advanced the money to pay off the debt due Richardson, by request of Mrs. Steiner, and the money was used for that purpose, this, without more, would make a case for the application of the doctrine of conventional subrogation. In order to recover on this theory, the plaintiff must show a state of facts from which either an express agreement or one arising by necessary implication will appear to have been made between him and Mrs. Steiner or Richardson, or their respective agents under authority from their principals, that the plaintiff was, so far as the dignity of his lien was concerned, to stand in the place of Richardson. It also results from the above that the amendment offered by the plaintiff claiming subrogation was subject to the demurrer filed thereto, for the reason that it is nowhere alleged therein that the plaintiff had an agreement of any character

with Mrs. Steiner or Richardson, whereby he was to be substituted to the latter's rights.

2. The defendants, however, contend that even if the evidence justified a finding that an agreement was made between Mrs. Steiner and Gibson that he was to be subrogated to the rights of Richardson, it would be inequitable and unjust to apply the doctrine in favor of Gibson, because he was guilty of inexcusable negligence; and the court was requested to charge that Gibson would not be entitled to subrogation if he was guilty of "inexcusable negligence" in failing to know or to act on his knowledge of the deed to Wilkins, Neely & Jones. It is undoubtedly true that if, on account of the gross negligence of the lender, the rights of intervening lienholders are prejudiced, and they are placed in a worse position than they would have been had the debt not been paid, the lender will not be entitled to subrogation. When the defendants, the holders of the intervening liens, took their mortgages, the lien of Richardson was in existence and superior to theirs, and of this fact they had knowledge. To substitute Gibson for Richardson would apparently place them in no worse position than they were before. Wilkins, Neely & Jones claim, however, as will hereafter appear, that they will be substantially and seriously injured if Gibson is permitted to assert the lien of Richardson against them. The fact that Gibson <sup>50</sup> may have known of the existence of the mortgages of defendants, which were executed before the cancellation of the deed to Richardson, will not defeat his right to subrogation, provided, of course, he had an agreement for subrogation. If he had such an agreement, he simply stands in equity in the place of Richardson, so far as the dignity of his debt is concerned. On account of this agreement equity simply assigns this security to him. See, in this connection, *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. Rep. 146, 149, 48 N. E. 166; *Levy v. Martin*, 48 Wis. 206, 207, 4 N. W. 35; *Hammond v. Barker*, 61 N. H. 53; *Campbell v. Trotter*, 100 Ill. 281; *Tryell v. Ward*, 102 Ill. 29. In *Bruse v. Nelson*, 35 Iowa, 157, it was held that subrogation would arise, provided the lender had no actual notice of the intervening lien, though it was of record. In *Union Mortgage etc. Co. v. Peters*, 72 Miss. 1059, 18 South. 497, it was held that a second mortgagee, being placed in no worse position by the transaction, cannot complain of the subrogation of the lender to the rights of the first mortgagee: See, also, *Draper v. Ashley*, 104 Mich. 527, 62 N. W. 707. The point



urged by the defendants against Gibson in this connection is, in its essence, that of equitable estoppel to claim subrogation, because the original lien was canceled through the negligence of Gibson in failing to take an assignment when the defendants' liens were outstanding. "Equitable estoppel is the effect of the voluntary conduct of a party, whereby he is absolutely precluded, both at law, and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct to change his position for the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or remedy": 2 Pomeroy's Equity Jurisprudence, sec. 804. See, also, Whiteselle v. Texas Loan Agency (Tex. Civ. App.), 27 S. W. 309, 315, where estoppel was invoked and denied by the court in a case similar to the one now in hand. While Wilkins, Neely & Jones do not claim to have advanced any money relying upon the fact that the Richardson deed had been canceled, nor that they have expressly released any security on this account, still they say that, treating the Richardson deed as having been canceled, they did not press their claim against Mrs. Steiner with the same vigor that they would have done if they had known their claim was to be treated as inferior to Gibson's, and that they would not have granted Mrs. Steiner the indulgences which they did grant <sup>51</sup> if they had not felt confident of having a first lien on the property; and that these facts would work an estoppel against Gibson to assert the right of subrogation. When a prior encumbrance has been canceled of record, and, acting on the faith of this, an intervening encumbrancer has delayed in prosecuting his legal remedies or has granted indulgences, the result of which is to make the exercise of the right operate to his serious disadvantage, while there may be no estoppel by reason of these facts against the right of a person advancing money to pay off the prior encumbrance to claim subrogation, still if he delays for an unreasonable length of time to claim the right and have the cancellation set aside, this will be a sufficient reason for a court of equity to refuse the right of subrogation.

3. It appears from the record that Gibson, the plaintiff, did not advance the entire amount necessary to satisfy the debt due Richardson, but that the defendants, Wilkins, Neely & Jones, paid a portion of the same. A portion of the aggregate amount paid by them was advanced after the date of their security deed of November 19, 1890, and a portion before, which they claim

was paid at the instance and request of Mrs. Steiner. They claim, therefore, to be subrogated to the rights of Richardson to the extent of the sum so advanced. It is well settled that if a senior mortgage be paid off by a junior mortgagee, he will, if the payment was necessary for his protection, be subrogated to the rights of the senior encumbrancer. In such a case, however, it must appear that the discharged mortgage was due and was about to be enforced against the property, and that its enforcement would prejudice the claims of the junior lienholders: Sheldon on Subrogation, 2d ed., secs. 12, 18; Harris on Subrogation, secs. 8, 94; 24 Am. & Eng. Ency. of Law, 1st ed., 269 et seq. In order, however, to entitle the junior mortgagee to subrogation, the general rule is that the whole debt must be paid and the senior creditor satisfied. Equity will not generally permit a junior encumbrancer to interfere with a senior lien so long as the lien creditor remains unsatisfied. In *Carter v. Neal*, 24 Ga. 346, 71 Am. Dec. 136, it was held: "To entitle one creditor to be subrogated to the rights of another creditor, the former must have satisfied the latter his demand so as to relieve him from trouble, expense, and risk": See, also, 24 Am. & Eng. Ency. of Law, 1st ed., 200, 255 (2), 273; Harris on Subrogation, secs. 28, 29; Sheldon on Subrogation, sec. 70. It seems, however, that if the debt be actually discharged, the junior encumbrancer would be <sup>52</sup> entitled to subrogation to the extent of the amount he contributed though the balance of the debt was paid by the debtor or by a third person. In *Comins v. Culver*, 35 N. J. Eq. 94, it appeared that a judgment was recovered against *Hetfield & Culver*. From this judgment an appeal was taken, and one *Pottle* became surety on the appeal bond. The judgment was affirmed. On it a portion of the debt was realized, and *Pottle* paid the balance. It was held that he was subrogated pro tanto to the right of the judgment creditor: See, also, *Vert v. Voss*, 74 Ind. 566. In *Magee v. Leggett*, 48 Miss. 139, 146, it was said: "We do not understand the rule as requiring that the 'surety' must make entire payment; it is enough if the creditor has been fully paid part by the principal debtor, and part by the surety. In such a case, subrogation will accrue pro tanto to the extent of his payment." We see no good reason why the same rule would not be applicable in the case of a junior mortgagee, who, together with the debtor, pays off a prior lien on the property. It results from this that if *Wilkins, Neely & Jones* contributed a portion of the amount which went to discharge the debt due *Richardson*, and this

amount was advanced for the purpose of protecting their security and rendering it more effectual, they would, after Richardson had been paid in full, be subrogated equally with Gibson, if it develops that he is in fact entitled to subrogation, to the extent of the amount so advanced; and in case the full amount of both claims is not realized upon an enforcement of the Richardson security, the defendants would be entitled to prorate the sum actually realized with the claim of Gibson. As to the sums advanced prior to the date of their security, they, of course, would have no claim for subrogation on the theory that they paid for their protection; but if they are entitled to subrogation at all as to these sums, it must be governed by the principles of conventional subrogation, above laid down.

4. But the defendants further insist that Gibson has waived his right to subrogation, by seeking to enforce his rights under the security deed held by him; that this is conclusive evidence that he has elected to rely on his security deed, rather than on his right to subrogation. We do not think this contention is maintainable. Gibson thought he was getting a first lien on the property. On no other theory would he have the semblance of a right to subrogation. If his security had been, in fact, prior in dignity, it would <sup>53</sup> have been unnecessary to claim the benefit of an equitable assignment of the Richardson security. It developed that Gibson's security was defective, but this was not definitely ascertained until he made an effort to enforce it. As soon as the defendants, by interposing a claim, thwarted this effort, he claimed the benefit of subrogation. We do not think he necessarily waived his equitable right by endeavoring to enforce his legal one: See Sheldon on Subrogation, sec. 42. Where a party has two remedies for enforcing a claim, the prosecution of one does not necessarily constitute a waiver of the other; and where one proves ineffectual, he may, as a general rule, resort to the other. It is true that delaying an unreasonable length of time to claim subrogation will sometimes amount to a waiver of the right: Sheldon on Subrogation, secs. 40, 110; 24 Am. & Eng. Ency. of Law, 1st ed., 320 et seq. But this we think is not applicable in a case like the present. Gibson had taken security, which was in itself not a waiver of his right to subrogation. As he had taken it, he had a right to endeavor to enforce it. This being so, simply delaying an assertion of his right to subrogation until his debt matured, or for a reasonable time thereafter, would not of itself amount to a waiver of the right.



5. The contention is further made by Wilkins, Neely & Jones that the security deed from Mrs. Steiner to Richardson and the one from her to Gibson were both infected with usury, and therefore void. Of course, if the deed to Richardson was infected with usury, it was void, and he was simply an unsecured creditor to the extent of the amount which he could lawfully collect. But we are unable to perceive that the contract was usurious, and the burden is on the defendants to make this appear. The deed is not usurious on its face, and it has not been shown that the transaction was a cover for the exaction of usury. There was testimony that the amount loaned Mrs. Steiner was \$6,000; whereas the amount of the debt secured by the deed was \$9,068. But this excess can be accounted for on the score of interest and lawful charges, such as commissions, etc. But be this as it may, it is incumbent on the defendants to show that the excess represented actually more than lawful charges, or that some trick or device was resorted to to evade the usury laws. If the excess was commissions charged by the persons who negotiated the loan, this would not make the contract usurious, unless these persons were the agents of the lender, who knew <sup>54</sup> that they were receiving compensation for their services out of the funds of the borrower, and that the amount of this compensation was incorporated in the deed to be collected along with the principal debt: See McLean v. Camak, 97 Ga. 804, 25 S. E. 493; Clarke v. Harvard, 111 Ga. 242, 36 S. E. 837; Finney v. Equitable Mortgage Co., 111 Ga. 108, 36 S. E. 461.

6. It was also contended that the security deed taken by Gibson was infected with usury and void, and that therefore he was not entitled to be subrogated to the rights of Richardson. Even if it be conceded that this deed was void for usury, this fact would not deprive him of the right to enforce the Richardson security for his benefit. On the question of subrogation, Gibson is to be dealt with as if he had taken no security at all and while, of course, he could not, by enforcing the Richardson lien, collect any higher rate of interest than the law allows he could nevertheless enforce this deed for the amount of money he advanced, together with lawful interest. Suppose Gibson had simply advanced money to Mrs. Steiner to pay Richardson on her promise to keep the latter's lien alive for Gibson's benefit, would the circumstance that Gibson charged or retained more than lawful interest defeat his right to enforce the agreement? Certainly not, to the extent

of the amount lawfully due. To hold otherwise would make the penalty imposed on him for charging usury a forfeiture of the entire debt. Besides, we think the point has been, in principle, decided in *McWilliams v. Bones*, 84 Ga. 203, 210, 10 S. E. 724, where it was held: "That the lender of the money used to pay off the prior mortgage liens charged usury did not deprive him of the equitable rights resulting from the application of his money to the discharge of the mortgages, the discharge of which was requisite for the debtor to have a homestead at all which would be free from encumbrances": See, also, *Bugg v. Russell*, 75 Ga. 837. It is claimed, however, that the doctrine of subrogation was not involved in these cases, the effect of these rulings simply being that the debt to which the homestead was sought to be subjected was for the purchase money, and the homestead was therefore liable to the payment of the same no matter in whose hands the debt might be. We think that the doctrine was directly involved, for the reason that while the original creditor was a purchase money creditor, and therefore his debt was superior to the homestead right, still, under the facts of these cases, the person seeking to enforce the right of this purchase <sup>55</sup> money creditor would not be allowed to assert the same under any other principle than one which would place him in the shoes of the original creditor; and this is exactly what subrogation is. It is true that in those cases the effect of applying the doctrine of subrogation was simply to defeat a right set up by the debtor, and that the rights of an intervening creditor were not involved, as they are in the present case; but the principle in each case is the same, and that is, that equity will allow one creditor under certain conditions to succeed to the rights and remedies of another, notwithstanding the creditor seeking such substitution may have attempted to collect usury from his debtor. Of course, a person seeking to enforce the payment of usury does not come into court with clean hands, and courts of law, as well as courts of equity, are closed against him; but when one having attempted to effect a usurious agreement repents of the wrong that he has done against the law and purges his debt of usury, and seeks to collect only that to which he is in good conscience entitled—that is, principal and legal interest—we know of no principle of law or equity which would close the doors of the courts against him and refuse to accord to him the rights which any honest creditor was entitled to receive either at law or in equity. As stated above, any other rule than this applied

in our courts would have the effect of causing the creditor to forfeit his entire debt as a penalty for attempting to exact usury, when the law of this state says that the utmost penalty which shall be imposed shall be a forfeiture of the usury charged and the loss of any security which depends upon a paper conveying title to property. If Gibson in the present case is attempting to enforce in the superior court as a court of equity a claim infected with usury, he will be entitled to no relief. On the other hand, if his debt is not infected with usury, or if at any time so infected and the same has been purged and he is seeking to enforce simply the amount of the true principal and legal interest, the superior court, as a court of equity, is open to him for the enforcement of any right to which he might be entitled, either at law or in equity, as a creditor of the estate of Mrs. Steiner. We conclude, therefore, that, though it should be made to appear that Gibson's deed was void for usury, he would still be entitled to be subrogated to the rights of Richardson, if he had an agreement to that effect, provided he is not seeking to collect more than the principal and legal interest of his debt.

56 7. As it may develop on another trial that Gibson is not entitled to subrogation, and as he may be confined to the remedy afforded by his security deed to enforce his debt, we shall deal with the demurrers to the equitable petition, both those grounds which were sustained, as well as those which were overruled. There was equity in the petition. The claimants based their claim mainly on the instrument executed in their favor by Mrs. Steiner on November 19, 1890. The petition attacks this deed and seeks to have it canceled. It alleges one state of facts which, if true, would estop the defendants from setting up the deed as against the plaintiff; and another state of facts which show that all rights under this deed had been lost by a novation. If these facts were established, Gibson's security deed was superior to the claim of the defendants. Under well-established practice, such a petition was allowable in aid of the plaintiff's execution. As to the grounds of the demurrer raising the points that the petition was not verified or sanctioned, they appear not to have been insisted on in this court, and we treat them as having been abandoned.

8. The assignments of error in the cross-bill of exceptions, on the action of the court in sustaining certain grounds of the demurrer and striking a part of the petition, bring up for consideration the questions raised by the plaintiff's allegations with



reference to the sale of the equity of redemption, and whether he has a right to have an accounting between Neely, as administrator, and Wilkins, Neely & Jones, as to rents, issues and profits. In dealing with these questions, it is to be remembered that under the plaintiff's allegations he had the senior lien on the property, Wilkins, Neely & Jones' deed of 1890 being, according to such allegations, void. Clearly, therefore, if the sale to Scudder was void, these defendants never acquired any title to the equity of redemption owned by Mrs. Steiner, at the time of her death, and the same is still a part of her estate. If Gibson was the holder of the senior lien, as he claimed to be by subrogation to the rights of Richardson, and the property taken as security for the debt had, by depreciation in value since the debt was contracted, become worth less than the debt, he would, on account of the insolvency of the estate of Mrs. Steiner, have an equitable claim upon the rents and profits of the property. While such a creditor has no legal title to the rents and profits, he has an equitable claim upon the same so far as they are needed to discharge <sup>57</sup> the debt due him: Dawson v. Equitable Mortgage Co., 109 Ga. 389, 394, 34 S. E. 668, and cases cited. This being true, Gibson would be entitled to set up, in an equitable amendment in the claim case, or in an independent equitable petition, his claim to these rents, and this claim would not constitute a new cause of action in the claim case, being merely an ancillary proceeding allowable under our loose and peculiar system: See, in this connection, Ford v. Holloway, 112 Ga. 851, 38 S. E. 373. Neither did joining in the equitable petition the claim for rents and the prayer that Neely, the administrator, and his firm, to whom it was alleged he had paid the rents, might be made to account for the same, constitute a misjoinder of causes of action; nor did the making parties of Scudder and Neely, administrator, constitute a misjoinder. In order to set aside the sale of the equity of redemption both Scudder and Neely, as administrator, were not only proper, but necessary, parties. In any view of the case Gibson had a right to have an accounting as to the rents between the administrator and the firm of which he was a member. If Wilkins, Neely & Jones were in possession under a valid sale of the equity of redemption, they stood simply in the shoes of Mrs. Steiner, and Gibson would have a right as against them, under his allegations, to so much of the rents as was necessary to make up the amount sufficient to discharge his debt. If they were in pos-

session under their security deed of 1890, this possession was simply for the purpose of collecting out of the rents, issues, and profits an amount sufficient to pay off the debt due them, and they would be liable to account to the estate of Mrs. Steiner for the benefit of Gibson for whatever amount they had realized from this source over and above the sum necessary to pay their debt: See *Gunter v. Smith*, 113 Ga. 18, 38 S. E. 374. Gibson would, however, as against them, have no right either to have the rents impounded or a receiver appointed, for the reason that there is no allegation that they are not amply able to respond to him for any amount for which they may ultimately be held liable. As the estate is alleged to be insolvent, and as it is also alleged that the administrator was misapplying the income, it is clear that Gibson had a right to have an accounting with the administrator, and to have the amounts which he has or ought to have received as rents applied by the court to the payment of his debt, there being a distinct allegation that Gibson and defendants are the only creditors of the estate: See, in this connection, *Polhill v. 58 Brown*, 84 Ga. 338 (9), 10 S. E. 921; *Jones v. McLeod*, 61 Ga. 607 (3). More especially is this true, when it is alleged that a sufficient amount has been collected from this source to pay off the debt due Wilkins, Neely & Jones, and that they are still collecting the rents under a pretended right claimed to have been acquired under a void sale of the equity of redemption.

9. When one is sued as executor or administrator, it is his duty to so plead as to protect himself from individual liability. If he does not so plead, the judgment will be conclusive on the question of assets in his hands with which to pay the claim on which he was sued. When he does so plead, the judgment is conclusive on both parties as to all questions which were raised in the pleadings or which could properly have been raised therein. Gibson and Neely, as administrator of Mrs. Steiner, are both bound by the judgment rendered in the case in which Gibson brought suit on his notes. Neither can go behind that judgment for any purpose. Consequently, Neely cannot be held liable personally or as administrator on account of any payments made by him prior to the judgment which were set up in his plea and on which the court found in his favor. If, however, he improperly, fraudulently, or collusively paid any amount to his firm which they were not entitled to receive, and Gibson did not, at the time of the judgment, know of the fraud or collusion, and could not have discovered it by the exercise

of ordinary diligence, then, under appropriate pleadings, the judgment might be set aside.

10. That part of the equitable amendment filed in the claim case, praying that Gibson might be subrogated to the rights of Richardson, should have been stricken for a reason additional to the one referred to above. The right to make equitable amendments of this character is limited to such amendments as set forth some reason in equity why the property levied on is subject to the execution as against the claimant: See *Ford v. Holloway*, 112 Ga. 851, 38 S. E. 373. If the deed executed by Mrs. Steiner in 1890 to Wilkins, Neely & Jones was a valid deed, the only equity which Gibson could set up to show that his execution should sell the land was one either tendering them their debt, or showing some good reason why he could not do so, or showing some reason why his judgment was superior to their deed. The amendment as filed shows on its face that the property is not subject to the Gibson execution, but avers facts <sup>59</sup> which show that in equity Gibson has another demand which is superior to the claimants' deed. Gibson had no right to a verdict and judgment finding the property subject to his execution for any amount, and the verdict rendered was contrary to the evidence. He had the right to fall back on the Richardson note and deed and use this security for his benefit. But he should have made Richardson a party and prayed for a judgment on the Richardson debt in his favor to the extent of the amount advanced by him, provided, of course, that in no event could he receive by subrogation or otherwise, as against the claimants, more than the amount of the Richardson debt, which he had paid: See, in this connection, *Holcombe v. Richmond* etc. R. R. Co., 78 Ga. 776, 3 S. E. 755; *Chappell v. Boyd*, 61 Ga. 663 (7); *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 120, 125, 20 S. W. 525. If Gibson desires to take anything under his new security, he must rest content with the dignity which the law gives it, and allow the claimants priority. If, on the other hand, he desires to place himself in Richardson's shoes, he must make Richardson a party to the case, or allege a sufficient reason for not doing so, and set up Richardson's rights and allow others to make the defenses which they would be permitted to make if Richardson were suing in his own right. This is subrogation, as we understand it.

11. The foregoing deals with all of the assignments of error that require to be treated at any length. We will now briefly refer to some of the others which raise questions that are likely



to arise at another trial. Complaint is made that the court erred in admitting in evidence Mrs. Steiner's application to Lawson & Scales for the loan, and also the certificate of these attorneys to the abstract of title, on the ground that the statements made therein were not binding on Wilkins, Neely & Jones. As neither the application nor the certificate is set out, either literally or in substance, in the motion for a new trial, we cannot deal authoritatively with these assignments of error. But we merely suggest that as the plaintiff claimed conventional subrogation, and as that depends upon a contract between himself and either Mrs. Steiner or Richardson, any evidence tending to show that such a contract was made would be admissible.

It is further argued that the jury found too large an amount as interest in favor of the plaintiff. As the case goes back for another trial, we deem it unnecessary to notice this point further than to say that the plaintiff would be entitled to recover interest <sup>60</sup> from the date he parted with his money. *Prima facie*, this was done on the date the notes were executed; and, if this is not true, it would be incumbent on the defendants to show this. The circumstance that the debt due Richardson may not have been paid and his deed canceled would not postpone the time that interest would begin to run. The plaintiff would be entitled to interest from the time he actually paid over the money.

One ground of the motion for a new trial complained that an answer to an interrogatory had been improperly admitted, because the interrogatory was a leading question. As to what is a leading question in an interrogatory, and the liberality to be allowed in such a case, see *Franks v. Gress Lumber Co.*, 111 Ga. 87, 36 S. E. 314. There was no error in refusing to require the plaintiff to elect whether he would prosecute the claim case or the equitable proceeding, in the light of the fact the causes were afterward properly consolidated by direction of the court: See *White v. Interstate etc. Assn.*, 106 Ga. 146 (1), 32 S. E. 26.

It was argued that at the date of the security deed of 1890, executed by Mrs. Steiner to Wilkins, Neely & Jones, she had nothing to convey, being the holder only of a bond for titles, with the legal title in Richardson. She was the owner of an equity of redemption, and as against all the world except Richardson she was the owner of the property. As against everyone except him she could set up that she was the owner of the property and entitled to all the rights as such, and her vendees could

do the same. Let the case be tried again in the light of the views above expressed.

Judgment on each bill of exceptions reversed.

All concurring.

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**Subrogation.**—If a junior mortgagee discharges the lien of a senior encumbrance, he becomes entitled to the benefits of the security represented by the lien so discharged: *Haverford Loan Assn. v. Fire Assn.*, 180 Pa. St. 522, 57 Am. St. Rep. 657, 37 Atl. 179.

**Subrogation.**—One who lends money to discharge liens on real property and who discharges them at the request of the debtor, expecting that his securities will of record take the place of that which he discharged, is not a volunteer. Therefore, he may be subrogated to the liens discharged, as where he discharges liens in the belief that none other exist against the property, and afterward learns of liens subordinate to those discharged: *Emmert v. Thompson*, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31. See, also, *Baker v. Baker*, 2 S. Dak. 261, 39 Am. St. Rep. 776, 49 N. W. 1064.

**Usury.**—A Claim to Subrogation growing out of an agreement void by reason of usury has been held to furnish no basis for equitable relief: *Roe v. Kiser*, 62 Ark. 92, 54 Am. St. Rep. 288, 34 S. W. 534; *Tribble v. Nichols*, 53 Ark. 271, 22 Am. St. Rep. 190, 13 S. W. 796.

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## DAVIS v. HOLLINGSWORTH.

[113 Ga. 210, 38 S. E. 827.]

**DEED TO PERSON NOT IN BEING.**—A deed to an immediate estate in land made to a person not in esse is absolutely void.

**DEEDS—ESTATE TAIL—FEE.**—A deed to a woman and her children, she having no children at the time, creates an express estate tail, and under the statutes of Georgia invests her with the absolute fee.

**DEEDS—LIMITING ESTATE GRANTED.**—THE HABENDUM of a deed may limit or qualify the estate named in the granting clause, to accord with the intention of the parties.

**DEEDS—FEE LIMITED UPON A FEE.**—Under the statutes of Georgia, it is competent to limit a fee upon a fee.

**DEEDS—QUALIFIED FEE.**—A deed to a woman and her children, she having no children at the time, and if she should die without leaving a child or children the land to revert to the donor or his heirs, conveys a qualified fee, subject to be divested upon the donee's death without leaving a child living at her death, or to become absolute upon her dying and leaving a child in life.

Brannen & Moore and J. F. Brannen, for the plaintiff.

Groover & Johnston, for the defendant.

**210** LEWIS, J. On January 12, 1893, George W. Waters conveyed to his daughter, Mary K. Davis, "and her children or child, should any be born to her," certain land in Bulloch county, the deed stipulating that "in the event the said Mary K. Davis should die without any child or children in life, then said land is to revert unto said George W. Waters, if living at the time of reversion, and if not living, then to his legal heirs." Mary K. Davis had no children at the time this deed was executed, but she subsequently gave birth to a daughter, Leonora Davis, for whose benefit suit in ejectment was brought against Hollingsworth to recover possession of the land in dispute. At the time of the commencement of this suit Leonora Davis was the only child of Mary K. Davis, but since then a second child has been born. Hollingsworth claimed under a deed from Jones, to whom Mrs. Davis had conveyed the land. The suit in ejectment was by agreement tried by the judge of the superior court, without the intervention of a jury, under an agreed statement of facts, the substance of which is contained in the foregoing. Judgment was rendered for the defendant, on the theory that the deed from Waters to his daughter, Mrs. Davis, was an attempt to create an estate tail, and passed the fee to her, and that therefore Hollingsworth took a good fee simple title from Jones, under whom he claimed. To this judgment the plaintiff excepts.

We think that there are two insuperable reasons why the children **211** of Mary K. Davis, of whom the plaintiff in error is one, can acquire no title to the land in dispute under the terms of the deed to which reference has been made. In the first place, they were not born or in esse when the deed was executed and delivered. It is a well-established principle of law that a deed to an immediate estate in land made to a person not in esse is absolutely void: See 9 Am. & Eng. Ency. of Law, 2d ed., 131; Devlin on Deeds, sec. 123; Martindale on Conveyancing, sec. 34; Tiedeman on Real Property, sec. 797; Dupree v. Dupree, Busb. Eq. 164, 59 Am. Dec. 590; Heath v. Heath, 114 N. C. 547, 19 S. E. 155; Morris v. Caudle, 178 Ill. 9, 69 Am. St. Rep. 282, 52 N. E. 1036, and cases cited. In the second place, the legal title was not conveyed to any living person as trustee for such after-born children as the daughter, Mrs. Mary K. Davis, might have. Under the decisions of this court, this course is permissible: See Hollis v. Lawton, 107 Ga. 102, 73 Am. St. Rep. 114, 32 S. E. 846. This principle is also recognized in the cases of Pierce v. Brooks, 52 Ga. 425; Brady v. Walters, 55 Ga. 25; Lee v.



Tucker, 56 Ga. 9; Carswell v. Schley, 56 Ga. 108; Boyd v. England, 56 Ga. 598; Adams v. Barlow, 69 Ga. 302; Sanders v. Houston etc. Warehouse Co., 107 Ga. 49, 32 S. E. 610; Taylor v. Brown, 112 Ga. 758, 38 S. E. 66. This being true, the legal effect of this part of the deed is the same as if it had been made to Mary K. Davis and her children (she having no children at the time), which, standing alone, would create an express estate tail and invest her, under the act of December 21, 1821 (Cobb's Digest, 169), with the absolute fee: Civ. Code, sec. 3085; Butler v. Ralston, 69 Ga. 485; Ewing v. Shropshire, 80 Ga. 382, 7 S. E. 554; Lofton v. Murchison, 80 Ga. 391, 7 S. E. 322; Estill v. Beers, 82 Ga. 612, 9 S. E. 596; Goodrich v. Pearce, 83 Ga. 783, 10 S. E. 451; Baird v. Brookin, 86 Ga. 709, 12 S. E. 981. If the limitation over had been upon an indefinite failure of issue, the result would have been the same and the absolute fee would have remained in her: Wilay v. Smith, 3 Ga. 551, 562; Brown v. Weaver, 28 Ga. 378. But the fee conferred upon Mary K. Davis, in the manner mentioned, was not absolute under all the terms of this deed of gift, on account of the subsequent words in the habendum, "and in the event the said Mary K. Davis should die without any child or children in life, then said land is to revert unto said George W. Waters if living at the time of reversion, and if not living then to his legal heirs." This is clearly a limitation over upon a definite failure of issue. The habendum of a deed may limit or qualify the estate named in the premises, or granting clause, to accord <sup>212</sup> with the intention of the parties: 2 Blackstone's Commentaries, \*298. Much latitude is allowed in this respect, especially in a deed of gift from a parent: Huie v. McDaniel, 105 Ga. 319, 322, 31 S. E. 189. And as it is also competent in this state to limit a fee upon a fee (Civ. Code, sec. 3082), the legal effect of these subsequent words, which create a limitation over upon a definite failure of issue of the first taker, is to make the fee given to Mary K. Davis by operation of law under the preceding clause a qualified fee, subject to be divested upon her dying without leaving a child living at her death, or to become absolute upon her dying and leaving a child in life. Indeed, this is not an open question in this state, as a deed identical to the one in this case was thus construed in Greer v. Pate, 85 Ga. 552, 11 S. E. 869: See, also, Chewning v. Shumate, 106 Ga. 752-3, 32 S. E. 544. Consequently, if Mary K. Davis, the first taker under the deed of gift in this case, dies without leaving a living child at her death, the fee in the land will revert

to the donor or his legal heirs; and if she dies leaving a child in life at her death, the fee will remain in the defendant in error, or in such person or persons as might then claim title under him: *Hill v. Alford*, 46 Ga. 247, 250; *Chewning v. Shumate*, 106 Ga. 752, 32 S. E. 544. It follows, therefore, that with this qualification of the title passing by the deed of gift from George W. Waters to Mary K. Davis, the judgment of the court below must be affirmed.

All the justices concurring.

### CONVEYANCES TO PERSONS NOT IN BEING.

#### I. Grants of Estates to Take Effect Immediately.

- a. Grantee not yet in Being.
- b. Grantee Who has Ceased to be in Being.
- c. Grantee en Ventre sa Mere.
- d. Grantee Named Being a Fictitious Person.
- e. Grants to Heirs of a Living Person.
- f. Grants to the Estate of a Designated Person.
- g. Grants to Corporations not in Existence.

#### II. Grants of Future Estates.

- a. Grants of Estates in Remainder.
- b. Grants to Trustees for Beneficiaries not in Being.

##### I. Grants of Estates to Take Effect Immediately.

a. Grantee not yet in Being.—The doctrine of the principal case that a deed to an immediate estate in land made to a person not in being is absolutely void, is undoubtedly a universally accepted rule: *Miller v. Chittenden*, 2 Iowa, 315, 368; *Harriman v. Southam*, 16 Ind. 190; *Morris v. Caudle*, 178 Ill. 9, 69 Am. St. Rep. 282, 52 N. E. 1036; *Lillard v. Ruckers*, 9 Yerg. 64; *Newsom v. Thompson*, 2 Ired. 277; *Heath v. Heath*, 114 N. C. 547, 19 S. E. 155; *Phelan v. San Francisco*, 6 Cal. 531; *Sloan v. McConahy*, 4 Ohio, 157, 170.

The reason for the rule arose from the necessity at common law, of a livery of seisin to sustain a conveyance of an immediate estate, and without a person in being capable of taking there could be no livery of seisin: *Miller v. Chittenden*, 2 Iowa, 315, 368; *Dupree v. Dupree*, Busb. Eq. 164, 59 Am. Dec. 590.

Property must at all times have an owner, and it was impossible for one person to part with his ownership unless there was another person to take it from him. A grantor, a grantee, and a thing granted were essential: *Dupree v. Dupree*, Busb. Eq. 164, 59 Am. Dec. 590. A deed to a person having no existence passed no title from the grantor: *Harriman v. Southam*, 16 Ind. 190. A deed to living children and also to unborn children confers no title upon an after-born child: *Lillard v. Ruckers*, 9 Yerg. 64.

A grant to the inhabitants of a certain town, if otherwise good, would confer no estate on any but the immediate residents, and would not extend to others who subsequently became inhabitants: *Sloane v. McConahy*, 4 Ohio, 157, 170. A deed conveying property to the children of a named person will convey a good estate to those in being at the time the deed was executed, but it cannot be made to include after-born children: *Hogg v. Odom*, Dud. 185. A deed to such children as should be alive at a certain date is void: *Hewitt v. New York etc. R. R. Co.*, 70 Conn. 637, 40 Atl. 605. A deed to a woman and her children conveys no title to children who are born more than a year thereafter: *Heath v. Heath*, 114 N. C. 547, 19 S. E. 155. And a deed to a grantee in being and to his unborn brother or sister, though delivered and recorded after the birth and death of a sister, is valid as to the grantee living at the time of the execution of the deed, but not as to such deceased grantee: *Morris v. Caudle*, 178 Ill. 9, 69 Am. St. Rep. 282, 52 N. E. 1036.

**b. Grantee Who has Ceased to be in Being.**—A conveyance to one who is dead at the time of execution is a nullity: *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Neal v. Nelson*, 117 N. C. 393, 53 Am. St. Rep. 590, 23 S. E. 428; *Morgan v. Hazlehurst Lodge*, 53 Miss. 665. A deed to a named person and his heirs, the person named being dead, conveys nothing to the heirs, for in such a case the word "heirs" is not a word of purchase carrying title to the heirs, but is a word of limitation qualifying the title of the grantee: *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Neal v. Nelson*, 117 N. C. 393, 53 Am. St. Rep. 590, 23 S. E. 428; *Morgan v. Hazlehurst Lodge*, 53 Miss. 665. But a deed to one who is dead at the time, "or his heirs," is good if the heirs can be identified, for the reason that he will take if living, and he has no heirs until his death: *Neal v. Nelson*, 117 N. C. 393, 53 Am. St. Rep. 590, 23 S. E. 428; *Ready v. Kearsley*, 14 Mich. 224. And under the statutes of Kentucky, a deed to a deceased person, if accepted by his children, will vest in them whatever title would have vested in their ancestor if living: *Northern Lake Ice Co. v. Orr*, 102 Ky. 586, 44 S. W. 216.

**c. Grantee en Ventre sa Mere.**—A child en ventre sa mere cannot take under a deed conveying an immediate estate. So far as common-law conveyances are concerned, a child must be actually born alive before it could be a grantee in a deed which gave an immediate estate: *Dupree v. Dupree*, Busb. Eq. 164, 59 Am. Dec. 590. An unborn child had no such existence as would enable it to take a present grant of lands by deed, although en ventre sa mere when the deed was executed: *Morris v. Caudle*, 178 Ill. 9, 69 Am. St. Rep. 282, 52 N. E. 1036. And a deed may be avoided by showing that the grantee came into being subsequent to the delivery of the deed: *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835. As will subsequently be seen, a child en ventre may, however, take a remainder, and under a trust. The statutes of North Carolina have



so modified this rule that a child who is en ventre sa mere at the date of the conveyance will take as a grantee, but children not conceived at the time of the execution of the deed cannot take: *Heath v. Heath*, 114 N. C. 547, 19 S. E. 155.

**d. Grantee Named Being a Fictitious Person.**—A deed to a fictitious person is void: *Morgan v. Hazlehurst Lodge*, 53 Miss. 665; *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio, 120, 42 Am. Dec. 191. A grantee is as necessary to the conveyance of land as a grantor. Hence a patent for land to a fictitious person not in existence carries no title, and invests no interest in anyone: *United States v. Southern Colorado Coal etc. Co.*, 18 Fed. 273; *Anderson v. Bartels*, 7 Colo. 256, 3 Pac. 225. A grant to a fictitious person is frequently held void because of uncertainty as to who is intended as grantee: *Weihl v. Robertson*, 97 Tenn. 458, 37 S. W. 274; it is also held void because there is no person in existence who can take as grantee: *Barr v. Schroeder*, 32 Cal. 609; *David v. Williamsburgh etc. Ins. Co.*, 83 N. Y. 265, 38 Am. Rep. 418.

Care should be taken to distinguish between a deed to a fictitious person who has no existence, and one to a person in existence, the conveyance being made to him by a fictitious name. If a person is in existence and ascertained, a conveyance to him by a fictitious name will pass title. In such a case, if the grantee is in existence and can be identified, it is immaterial by what name he is called, and he may even assume a name for the occasion: *Wilson v. White*, 84 Cal. 239, 24 Pac. 114; *Thomas v. Wyatt*, 31 Mo. 188, 77 Am. Dec. 640.

**e. Grants to Heirs of a Living Person.**—A grant to the heirs of a living person is void: *Hall v. Leonard*, 1 Pick. 27; *Morris v. Stephens*, 46 Pa. St. 200; *Huss v. Stephens*, 51 Pa. St. 282; *Outland v. Bowen*, 115 Ind. 150, 7 Am. St. Rep. 420, 17 N. E. 281; *Tinder v. Tinder*, 131 Ind. 381, 30 N. E. 1077; *Brooker v. Tarwater*, 138 Ind. 385, 37 N. E. 979; *Winslow v. Winslow*, 52 Ind. 8.

This doctrine, in this country, seems to be based on the case of *Hall v. Leonard*, 1 Pick. 27, which holds such a grant void, as there are no persons in esse who can take under the description, citing *Perkins*, section 52, as authority for the proposition. This case while it was at first followed without question, has been criticised to a considerable extent, so that it is confined to its precise terms, and if any words are found in the grant which indicate an intention to treat the word "heirs" as meaning "children," the conveyance will be given effect so far as concerns the children then in being: See *Huss v. Stephens*, 51 Pa. St. 282; *Tinder v. Tinder*, 131 Ind. 381, 30 N. E. 1077. In this first case, the supreme court of Pennsylvania in criticising the Massachusetts case, said: "If the learned judge of the supreme court of Massachusetts had noticed that this rule from *Perkins* was predicated of incorporeal interests, which lie only in grant and are not susceptible of livery, he would not have misled us into applying it to a conveyance of land here in Pennsyl-

vania, where registry stands instead of livery." And the Indiana supreme court, in the last case cited above, said that "while it may be true that we are committed to the rule stated, it is also true that the court has manifested a purpose to restrict rather than enlarge its operation. . . . We think the rule is not one to be applied except in cases falling bodily within its operation."

f. **Grants to the Estate of a Designated Person.**—A deed to the "estate of" a named person is a nullity. Such deed does not name a grantee who is in being, and capable of taking the estate conveyed: *Simmons v. Spratt* (Fla.), 1 South. 860; *Simmons v. Spratt*, 20 Fla. 495; *McInerney v. Beck*, 10 Wash. 515, 39 Pac. 130. Such a deed does not convey any interest to one who is the sole beneficiary under the will of the decedent to whose estate the grant is made: *Simmons v. Spratt*, 20 Fla. 495.

g. **Grants to Corporations not in Existence.**—A deed to a corporation which is not yet organized and has no valid existence is a nullity and passes no title to anyone: *Douthitt v. Stinson*, 63 Mo. 268; *Phelan v. San Francisco*, 6 Cal. 531; *Harriman v. Southam*, 16 Ind. 190; *Russell v. Topping*, 5 McLean, 194, Fed. Cas. No. 12,163. A grant to a corporation by name when no such corporation is in existence conveys nothing, because there is no grantee capable of taking: *Douthitt v. Stinson*, 63 Mo. 268. This rule was applied in *Russell v. Topping*, 5 McLean, 194, Fed. Cas. No. 12,163, to the case of a corporation, which although organized, was prohibited by its charter from acquiring real estate by grant, the court saying: "If a man grant his estate to an imaginary corporation which exists only in his own mind, no title passes, and it is precisely the same if it is granted to a corporation rendered incapable of taking the grant. As to that particular faculty it is not a corporation."

These decisions, however, refer to the transfer of the legal title, and it seems do not affect the equitable rights of the parties growing out of the transaction. Hence, in *White Oak Grove Ben. Soc. v. Murray*, 145 Mo. 622, 47 S. W. 501, the court, while admitting that a deed to an unincorporated company did not convey the legal estate, nevertheless held that "where a grantor conveys land to such a company, and receives and retains the money of its members therefor, he will be estopped from denying the validity of the corporation or its powers to receive the grant. And when such company afterward becomes legally incorporated with the same name, a suit by it to compel the grantor to make a new deed and to enjoin all interference by him will be upheld." But see *Harriman v. Southam*, 16 Ind. 190, where a grantor was held not to be estopped to deny the existence of the corporation to which he had conveyed land, and was allowed to recover the land.

## II. Grants of Future Estates.

a. **Grants of Estates in Remainder.**—The rule that an estate cannot be conveyed to a grantee unless he is in being at the time the

deed is executed is confined to estates which take effect immediately, and are not applied to future estates in remainder: *Dupree v. Dupree*, Busb. Eq. 164, 59 Am. Dec. 590; *Newsom v. Thompson*, 2 Ired. 277. It is not, however, every future estate that is valid when granted to a person not in esse. As has already been seen, the reason why a grantee must be in being, was the necessity of having some one to whom livery of seisin could be made. And this reason was not offended nor the rule violated by allowing an unborn grantee to be given an estate in remainder, because livery of seisin could be made to the life tenant, and the rule was, therefore, satisfied: *Dupree v. Dupree*, Busb. Eq. 164, 59 Am. Dec. 590. But there must be some one in existence to whom livery could be made. And a deed conveying a future estate to one not in being, and giving no present estate to a living person, would be void. Thus a deed to such children as should be alive at a certain future date was void, for it undertook to create a freehold estate to commence in the future, without any intervening and precedent estate to support it: *Hewitt v. New York etc. R. R. Co.*, 70 Conn. 637, 40 Atl. 605. But if there is a precedent life estate, the remainder may be given to a person unborn. Such a remainder will be contingent until the birth of one who answers the description of the grantee, when it will become as fully vested as if it had been granted to a living person: *Amos v. Amos*, 117 Ind. 19, 19 N. E. 539. For other illustrations of estates in remainder granted to persons not in esse, see *Graham v. Houghtalin*, 30 N. J. L. 552; *Reed v. Fidelity Trust etc. Co.*, 19 Ky. Law Rep. 1895, 44 S. W. 957; *Fort Jefferson Imp. Co. v. Dupoyster*, 21 Ky. Law Rep. 515, 51 S. W. 810; *Lariverre v. Rains*, 112 Mich. 276, 70 N. W. 583. In *Johnstone v. Talliaferro*, 107 Ga. 6, 32 S. E. 931, the remainder was granted to the children of the life tenant, who was not married at the time of the execution of the deed. In *Coots v. Yewell*, 95 Ky. 367, 25 S. W. 597, 26 S. W. 179, the remainder was granted to the children of the life tenant, who had none either at the time the deed was executed or subsequently, and it was held that the fee remained in the grantor which, upon his death, vested in his heirs, so that they could convey a good title.

An unborn grantee must come into being during the continuance of the intermediate estate, or at the moment of its termination, otherwise there is no one in being in whom the remainder could vest as a present estate in possession: *Dupree v. Dupree*, Busb. Eq. 164, 59 Am. Dec. 590. As has been seen, according to the strict rules of the common law, a child en ventre sa mere at the time of the termination of the particular estate was not deemed to be in esse, and hence could not take the remainder. But this was remedied by the statute 10 and 11 William III, which allowed remainders to vest in children while yet in their mother's womb. This statute was, however, confined to remainders, and did not change the rule



as to the grant of an immediate estate to a child en ventre: Dupree v. Dupree, Busb. Eq. 164, 59 Am. Dec. 590.

b. **Grants to Trustees for Beneficiaries not in Being.**—The principal case recognizes that property may be conveyed to a living person as trustee for the benefit of after-born children. The doctrines relating to trusts were borrowed largely from the civil law. So that both in conveyances to uses and in wills, there was a great departure from the common law. For, as was pointed out in Dupree v. Dupree, Busb. Eq. 164, 59 Am. Dec. 590, "inasmuch as the legal ownership passed to the trustee or the heir at law or executor, that was supposed to satisfy the rule of the common law, which requires that property should at all times have an owner; and the use was left to be shifted about according to the intention of the grantor, until it became necessary that the use should draw to itself the legal estate." The rule as applied to charitable trusts was stated thus in Miller v. Chittenden, 2 Iowa, 315, 368: "By the common law, all grants between individuals must be made to a grantee in existence, or capable of taking, otherwise there could be no such thing as livery of seisin. This rule does not apply, however, to grants or devises to charitable or benevolent purposes, and especially when the legal estate is vested in trustees, to hold for the use of the contemplated charity. In such cases, if the intent of the donor can be ascertained, and it be legal, courts of equity will carry it out." Of course the deed must show an intention to benefit unborn grantees or they will not be included. And a trust deed for the benefit of a woman and her children, there being nothing on the face of the deed to indicate a contrary intention, will vest no title in the children afterward begotten, but will be confined to the woman and her children then born: Gay v. Baker, 5 Jones Eq. 344, 78 Am. Dec. 229; Hollis v. Lawton, 107 Ga. 102, 73 Am. St. Rep. 114, 32 S. E. 846. In cases of trust, also, a child en ventre ~~sa~~ mere is considered in esse and will take the same as a living beneficiary: Gay v. Baker, 5 Jones Eq. 344, 78 Am. Dec. 229; Dupree v. Dupree, Busb. Eq. 164, 59 Am. Dec. 590.

## SLAUGHTER v. STATE.

[113 Ga. 284, 38 S. E. 854.]

**MISDEMEANORS — PRINCIPAL AND ACCESSARY.**—In misdemeanors there are no accessories before the fact nor principals in the second degree, but all are principals.

**LARCENY — MISDEMEANORS — PRINCIPALS — CONSPIRACY.**—A private detective who induces a merchant to offer a reward for the detection of a thief in his employ, when no theft has been committed, and then, through an agent, induces an employé to steal goods and returns them in order to obtain the reward, is guilty of larceny.

**LARCENY—INTENT TO APPROPRIATE—HOLDING FOR REWARD.**—To constitute a larceny it is sufficient if the property be taken and carried away with the intent to appropriate any pecuniary right or interest therein, as where it is taken with the expectation of claiming a reward for its return.

**CONSPIRACY — EVIDENCE.** — THE DECLARATIONS OF ONE CONSPIRATOR, made before the conspiracy was ended, are admissible in evidence and binding upon all the other conspirators, although the one making them is not indicted and tried with the others.

Westmoreland Brothers and T. L. Bishop, for the plaintiffs in error.

C. D. Hill, solicitor general, contra.

**284** SIMMONS, C. J. Bradley Slaughter and Horace Looney were jointly indicted and convicted of the offense of larceny. They moved for a new trial, and the judge overruled the motion. To this judgment they excepted. Construing the evidence most strongly in favor of the verdict, we find it substantially as follows: Slaughter, Horace Looney, and D. S. Looney, Horace Looney's father, were **285** private detectives. On January 15, 1901, Slaughter told Schaul, a merchant, that his store was being systematically robbed, and that Slaughter would catch the thief for fifty dollars. Schaul stated that nothing had been recently missed from the store, but that he would take the matter under consideration. On the 18th of the same month, in another conversation, Schaul agreed to pay Slaughter fifty dollars reward for the detection and conviction of the alleged thief. Jackson, a negro bootblack, who was used by the defendants in some of their detective work, was told by D. S. Looney that if he saw anyone attempting to sell stolen goods to bring the articles to his office. Shortly thereafter, Fluellen, a negro boy employed in Schaul's store, turned over to Jackson, for sale,

a finger-ring. Jackson took the ring to the office of the private detectives. They told him to retain it for the time, and afterward D. S. Looney told Jackson to have Fluellen to "get" a watch. Jackson told Fluellen that he could sell a watch for him if he would get it, and Fluellen brought a watch to Jackson. Jackson, on January 22d, carried this watch to the office of the detectives and turned it over to Horace Looney. On the next day Slaughter telephoned Schaul to come to the office. Upon Schaul's arrival Slaughter showed him the watch and ring, and asked him if he could identify them. He identified the watch as having come from his store, but could not say whether it had been stolen or sold. The watch was then taken to Schaul's partner, who immediately identified it as a watch that had been stolen; for he had given a tray of watches to Fluellen to clean and had afterward missed this watch from the tray. The ring was like some carried in stock by Schaul, but was a cheap ring, of a character not easy to identify. No other articles were missed from the store of Schaul, and it may be inferred from the evidence that nothing else was stolen at or about this time. It appeared without contradiction that Fluellen stole both the ring and the watch. Jackson testified that neither of the defendants nor D. S. Looney had told him to have Fluellen to steal a watch, but only to have him to "get" a watch. Fluellen testified that he had been induced to steal both the ring and the watch by Jackson's continued solicitation, Jackson stating to him that there were some people in an office who wanted a watch and ring, and who would buy them if he would steal them. It appears that the watch and the ring were returned by the detectives to Schaul, the owner.

<sup>286</sup> 1. One of the grounds for motion for new trial was that the court erred in charging the jury substantially what is set out in the first headnote hereto, the complaint being that the defendants were not indicted for conspiracy, and that the charge dealt with an offense different from that with which the defendants stood charged. We think this ground of the motion without merit. The facts that one of the detectives solicited a reward from Schaul for the detection of a thief represented to be systematically robbing Schaul's store, that Schaul agreed to pay the reward, that another of the detectives had Jackson to induce Fluellen to steal from Schaul's store, that the stolen articles were turned over to the third detective and subsequently returned to their owner, that nothing else was missed from the store, and that all these things took place within a very few days,



would clearly indicate that there was a conspiracy or joint scheme, to which the detectives and Jackson were parties, to have Fluellen commit the larceny and then to claim the reward for his detection. In misdemeanors there are no accessories before the fact nor principals in the second degree, but "all who would be such in felonies are principals in misdemeanors": *Kinnebrew v. State*, 80 Ga. 232, 5 S. E. 56. What each of these parties did was the action of all; and when Fluellen committed the larceny, taking and carrying away the property with intent to steal it, his action was, in law, that of Jackson and of the detectives who had instigated the crime. Fluellen was not party to the scheme to obtain the reward, and stole *lucri causa*, but he shared with the others the intent that the larceny should be committed, and they were bound by what he did in this matter, although some of them may not have known that Fluellen was the person who was to commit the larceny. The defendants' agent incited and induced Fluellen to commit the larceny, and the agent's knowledge was imputable to the defendants. The statements of Jackson and Fluellen were largely denied by the defendants, but the jury believed the witnesses rather than the defendants. Slaughter, in his statement, said that it was often necessary to use a "stool-pigeon" in order to catch a thief. The defendants also claim that they were merely endeavoring, as private detectives, to detect a criminal. How far private detectives may go in such matters it is difficult definitely to state. It has been held that, after the detectives have ascertained that a conspiracy has already been formed by others with intent to commit a crime, they may join the <sup>287</sup> conspirators and go with them to the place where the crime is committed, in order to obtain evidence to convict the real criminals. Whatever may be the law upon that point, we are clear that a private detective cannot originate a conspiracy for the purpose of committing crime, and then, after having induced others to commit the crime, claim for himself innocence and immunity. It was argued here that the defendants were not guilty of larceny, because the goods were returned to the owner and the defendants had at no time any intent to appropriate them to their own use or to permanently deprive the owner of them. It is settled that where one finds property belonging to another and conceals it for the purpose of returning it after a reward has been offered by the owner, and of obtaining such reward, he is guilty of larceny: *Commonwealth v. Mason*, 105 Mass. 163, 7 Am. Rep. 507; *Berry v. State*, 31 Ohio St. 219, 27 Am. Rep. 506; 2

Clark & Marshall on Crimes, 747; 1 Wharton on Criminal Law, 10th ed., sec. 906. "Although intent to appropriate is essential [to larceny], yet such appropriation may be made even though there is a purpose to return the property to the owner, if the purpose is to make use of the temporary possession and subsequent return with a view of obtaining a pecuniary advantage": 1 McClain on Criminal Law, sec. 567. It is not necessary, to constitute larceny, that the property should be itself permanently appropriated. It is sufficient if the property be taken and carried away with the intent to appropriate any pecuniary right or interest therein, as where it is taken with the expectation of claiming a reward for its return. The facts of the present case differ from those of the cases referred to by the above-cited authorities, but we cannot see that there is any difference in principle that would constrain us to hold that the defendants were not guilty of larceny. They did not expect to retain the goods or to permanently deprive the owner of them, but they did expect to claim the money reward offered by the owner for the detection of the thief, the reward having been offered before the goods were taken. As to this matter, Dr. Wharton, in his work on Criminal Law, tenth edition, volume 1, section 149 (2), says: "All detectives are in one sense decoys, and all decoys are in one sense detectives. But when the decoy ceases to be detective, and becomes the apparent originator of the crime, then, . . . if he was not employed by the government, . . . he becomes a co-conspirator liable to the same punishment as his associates, on the same principle as that which makes <sup>288</sup> a person who appropriates lost property for the purpose of getting a reward indictable for larceny": See also, *State v. Dudoussat*, 47 La. Ann. 977, 17 South. 685, where it is ruled that a detective or decoy does not become a real accomplice because he uses devices to detect crime, "provided the device is not a temptation and solicitation to commit it." In the same case, in discussing the admissibility of evidence, where the defendant had been entrapped, it was said: "It was essential, therefore, to show that the defendant proposed to commit the crime, and the means employed were not used as an inducement or temptation, but for the purpose of securing the evidence." It appears to us to be less criminal to conceal lost property with the hope and purpose of getting a reward which may be thereafter offered for its return than to induce a man to offer a reward for the detection of a thief, when no theft has been committed, and then concoct a scheme to have goods stolen and returned in order to obtain the

reward. After a careful consideration of the case, we think the charge of the court was sustained by the law and the evidence.

2. Upon the trial the court overruled the defendant's objections to certain testimony of Jackson, offered by the state, as to the directions given by D. S. Looney to Jackson "to have Fluellen get a watch, the objection being that it was hearsay and did not bind the defendants." We think the evidence was properly admitted. It is true D. S. Looney was not on trial and had not been indicted with the defendants, but, if he was in the conspiracy with the others, his declarations, made before the conspiracy was ended, were as binding upon them as though he had been indicted and tried with them. "It makes no difference, as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter; for the making one a co-defendant does not make his acts or declarations any more evidence against another than they were before; the principle upon which they are admissible at all being that the act or declaration of one is the act or declaration of all united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted": Wharton on Criminal Evidence, 9th ed., sec. 700. Of course, the declarations or acts of a third party can have no probative value in this connection, unless the conspiracy is proved. It may be proved either before the admission of evidence as to the acts or declarations or afterward. If no conspiracy is proved, the evidence <sup>289</sup> as to the acts or declarations amounts to nothing. In the present case there was evidence tending to show that D. S. Looney joined in the scheme or conspiracy with the defendants and Jackson, and there was no error in admitting evidence of his declarations.

3. There was some evidence to show the guilt of the defendants, and the jury, by their verdict, accepted this evidence as true. The trial judge approved their finding, and this court will not interfere with his discretion in refusing to grant a new trial upon general grounds.

Judgment affirmed.

All concurring, except Lewis, J., absent.

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**Decoying into Crime.**—Officers and detectives have no right to suggest the commission of a crime and instigate others to take part in its commission, in order to arrest them when in the act, although the purpose may be to capture old offenders. Such conduct is not only reprehensible, but criminal, and will not be justified or en-



couraged by the courts: *Connor v. People*, 18 Colo. 373, 36 Am. St. Rep. 295, 33 Pac. 159.

**Larceny.**—If one takes property with the intent to retain it until he is paid a reward for its restoration to the owner, and in the event of not receiving such reward not to return the property, the taking is larceny: *Dunn v. State*, 34 Tex. Cr. Rep. 257, 53 Am. St. Rep. 714, 30 S. W. 227.

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### CANDLER v. KIRKSEY.

[113 Ga. 309, 38 S. E. 825.]

**CRIMINAL RECOGNIZANCES—DEFENSE TO.**—Since an indictment which charges the principal in a criminal recognizance with no offense against the state amounts to no indictment, the sureties may set up its invalidity in defense to a scire facias to forfeit the recognizance.

Moses Wright, solicitor general, for the plaintiff.

M. B. Eubanks, contra.

**309 FISH, J.** This was a proceeding to forfeit a criminal recognizance. In defense to the scire facias, the sureties set up that the indictment against their principal was fatally defective, and counsel for the state practically conceded this to be true. The court below discharged the sureties, and this is the ruling of which complaint is made in the bill of exceptions. The question thus made has been settled by the decisions of this court, which we are now asked to review. In *State v. Lockhart*, 24 Ga. 420, in ruling upon the <sup>310</sup> point, the court said: "In *Liceth v. Cobb*, 18 Ga. 314, this court held that the defendant was not bound to appear before indictment, . . . and that it is good ground of demurrer to a scire facias that it was issued before indictment. If, then, the indictment in this case was fatally defective, not only not charging the defendant with the particular offense for which he was recognized to appear, but with none other, then the party stands unindicted to this time, and there has necessarily been no breach of his bond." This decision was cited and approved in *State v. Woodley*, 25 Ga. 235, and in *McDaniel v. Campbell*, 78 Ga. 188. We think, as held in these cases, that an indictment which charges the principal in the recognizance with no offense against the state amounts to no indictment, and that the sureties may set up its invalidity in defense to a scire facias to forfeit the recog-

nizance. We, therefore, upon a review of the cases above referred to, affirm the same.

Judgment affirmed.

All the justices concurring.

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**Bail—Discharge of.**—Quashing the indictment against a principal, who has given bail to appear and answer, releases the surety: See the monographic note to *Belding v. State*, 99 Am. Dec. 222. But the destruction of the indictment is no defense to an action on the recognizance: *People v. Dennis*, 4 Mich. 609, 69 Am. Dec. 338.

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## BANK OF FORSYTH v. DAVIS.

[113 Ga. 341, 38 S. E. 836.]

**CONVERSION—COLLATERAL SECURITIES—TRANSFER OF PROMISSORY NOTES.**—The payee of a negotiable promissory note, with whom other similar notes have been deposited as collateral security, may properly transfer such collateral security to one to whom he has assigned the principal note, and he is not liable to the depositor for a subsequent wrongful conversion of the collaterals by the transferee.

**NEGOTIABLE INSTRUMENTS—PAYEE'S RIGHT TO TRANSFER.**—One who makes a negotiable promissory note and delivers it to another is charged by the law with notice that the payee of the note has a right to transfer it by sale or otherwise to whomsoever he may see proper.

R. L. Berner, for the plaintiff in error.

Cabaniss & Willingham, contra.

**342 COBB, J.** The controlling question in this case is whether the payee of a negotiable promissory note, with whom other notes of like character have been deposited as collateral security, is liable to the depositor for a conversion of the collaterals by one to whom the payee had transferred the principal note, and who as a result of such transfer came into possession of the collaterals. The solution of this question depends upon whether the payee in the original note had a right to transfer the collaterals. He was certainly authorized to transfer the principal note, which was his property. If he could transfer the debt due him, is there any good reason why he should not have been allowed at the same time to transfer the property which he had received in pledge to secure the principal note? This question seems to be settled by the Civil Code, section 2961,

which declares: "The pawnee may transfer his debt, and with it the possession of the thing pawned, and the purchaser stands precisely in his situation." When the pawnee transfers his debt and delivers to the transferee the property given to secure the debt, the transaction is not a sale of the pledge, but simply places the transferee in the same position which the original creditor occupied. Consequently, the provisions of section 2958 of the Civil Code, with reference to sales by a pawnee of the property received in pledge, are not applicable to such transfer. The section of our code which authorizes the pawnee to transfer the debt and with it the thing pawned seems to be a codification of the common law: See *Goss v. Emerson*, 23 N. H. 38; 18 Am. & Eng. Ency. of Law, 1st ed., 661; Schouler on Bailments and Carriers, 218; Jones on Pledges and Collateral Securities, 2d ed., sec. 425. It is said, however, that very great hardship may result from this rule, growing out of the fact that the payee of the note, with whom the collaterals were originally deposited, may be solvent and a person to whom the maker of the note would willingly trust the securities delivered in pledge, and the transferee might be one who was insolvent and irresponsible, on account of which loss would result to the maker of the principal note if the transferee converted the collaterals to his own use. One who makes a negotiable promissory note and delivers it to another is charged by the law with notice that the payee of the note has a right to transfer it by sale or otherwise to whomsoever he may see proper. If, therefore, the maker<sup>343</sup> of the note desires to be protected against a transfer by the payee of other notes given to secure the debt, he should let his debt be evidenced by a non-negotiable paper.

Judgment reversed.

All concurring, except Lewis, J., absent.

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**Collateral Securities.**—On the rights and liabilities of holders of collateral securities, see the monographic notes to *Griggs v. Day*, 32 Am. St. Rep. 711-731; *State v. Bank of New England*, 68 Am. St. Rep. 542-547.



## CENTRAL OF GEORGIA RAILWAY CO. v. BROWN.

[113 Ga. 414, 38 S. E. 989.]

**MASTER AND SERVANT—LIABILITY FOR SERVANT'S TORT.**—A CORPORATION is answerable for the torts of its servants in the same cases, and in the same manner and form of action, as other masters.

**MASTER AND SERVANT—LIABILITY FOR WILLFUL TORT.**—A master is liable for the torts of his servant, committed in the course of the servant's employment, though the tort is willful.

**TRESPASS AND CASE—JOINDER OF ACTIONS.**—Under the system of code pleading, the distinction between trespass and trespass on the case has been abolished, and the two may be joined in one action.

**MASTER AND SERVANT—WILLFUL TRESPASS—JOINT ACTION.**—A master and servant may be jointly sued in trespass for a willful wrong committed by the servant within the scope of his employment.

**TRESPASS—PRINCIPALS.**—In trespass all are principals and the act of one is the act of all.

**MASTER AND SERVANT—JOINT TRESPASSERS—STRANGER—VENUE OF ACTION.**—If the conductor of a railroad train undertakes without justification to eject a passenger, and another passenger, voluntarily or at the request of the conductor, joins in the illegal act and thereby commits an assault, the company, the conductor, and the assisting passenger are joint trespassers, who may be sued in one action in the county of the residence of either.

**JURISDICTION—PLEA, TO—MERITS OF CASE.**—In trying a plea to the jurisdiction of the court it is not proper to go into the merits of the case.

Hall & Wimberly and R. C. Jordan, for the plaintiff in error.

Marmaduke G. Bayne, contra.

**414** **SIMMONS, C. J.** An action for damages was brought, in the city court of Macon, in Bibb county, by Julius Brown against McCowan and the Central of Georgia Railway Company. In the petition it was alleged that plaintiff was a passenger on an excursion train of the company, going from Savannah to Macon, Georgia; that on the trip the conductor, desiring to eject plaintiff from the car set aside for white persons, procured the assistance of McCowan; that a willful and unjustifiable assault and battery was committed upon him by McCowan with the acquiescence and assistance of the conductor; that they caused him to be arrested and imprisoned after the train reached Macon; that his arrest and imprisonment were unlawful and malicious; that McCowan was a resident of Bibb county,

in which the suit was brought, and that the defendant company was a corporation of this state; that in the assault and <sup>415</sup> battery of plaintiff, McCowan and the conductor acted jointly, and that the defendants were jointly liable to him in damages. The railroad company filed a plea to the jurisdiction, on the ground that the acts complained of were not committed in Bibb county, but in the county of Washington, and that suit could be brought against the company, under the provisions of the Civil Code, section 2334, in that county only in which the cause of action originated, or, if it had no agent in that county, in the county of its residence. The issues made by the plea to the jurisdiction were tried apart from the main case. Evidence was introduced by both sides. From this evidence it appeared that the acts alleged to constitute an assault and battery were committed in Washington county. Evidence was also introduced upon the merits of the case, the defendant company seeking thereby to justify the acts of the conductor and those of McCowan, while the plaintiff's evidence tended to show that the assault was unwarranted and unjustifiable. After the close of the evidence, the trial judge directed a verdict against the plea to the jurisdiction. To this the company excepted.

1, 2. It was argued that, under the Civil Code, section 2334, providing for the venue of suits against railroad companies, the courts of Bibb county were without jurisdiction in this case. Had the company alone been sued for acts committed in another county, it was admitted that this code section would be controlling; but counsel for the plaintiff contended that the court had jurisdiction under paragraph 4 of section 16 of article 6 of the constitution of this state. This constitutional provision (Civ. Code, sec. 5872) is as follows: "Suits against joint obligors, joint promisors, copartners, or joint trespassers, residing in different counties, may be tried in either county." Whether this suit was properly brought must then depend upon whether McCowan and the railroad company were liable to the plaintiff, under the allegations of his petition, as "joint trespassers." Under those allegations both McCowan and the conductor were clearly liable in an action of trespass, and we must determine whether the company was liable for the acts of the conductor so as to make it answerable therefor in an action of like kind. One of the first questions which arises is whether a corporation can be sued in trespass. It is curious and interesting to read of the evolution of the doctrine that a corporation can be so sued. At an earlier period it was sup-

posed that a corporation could not <sup>416</sup> commit a tort, and that no action sounding in tort would lie against it; that the corporation was created for lawful purposes, and had no power to do anything unlawful; and that whenever its servants, agents, or officers exceeded the charter authority by doing an unlawful act, they necessarily committed the act as individuals and not as representatives of the corporation. Later cases entirely repudiated this doctrine, and it is now universally held that corporations may, in certain cases, be held liable in actions sounding in tort. Among the older decisions will also be found instances in which courts have held that a corporation could in no instance be held guilty of a trespass, because the corporation had no arms with which to commit it, and could not beat or be beaten. Another reason given for holding that a corporation could not be sued in trespass was that *capias* and *exigent* would not lie against it, as it had no body to be seized. Modern decisions show that, while a corporation has itself no arms to commit a trespass, it has the right, and exercises it, to employ servants and agents whose acts are the acts of the corporation and who can and do commit trespass; and that the writs of *capias* and *exigent* are unknown to the law of this country. The courts, therefore, hold that an action of trespass, as well as of trespass on the case, can and will lie against a corporation: 5 Thompson on Corporations, sec. 6305; *St. Louis R. R. Co. v. Dalby*, 19 Ill. 353; *Whiteman v. Wilmington etc. R. R. Co.*, 2 Harr. (Del.) 514, 33 Am. Dec. 411; *Ramsden v. Boston etc. R. R. Co.*, 104 Mass. 117, 6 Am. Rep. 200; *Eastern Counties Ry. Co. v. Broom*, 6 Ex. 314.

The result of these cases is to settle definitely the proposition that a corporation is answerable for the torts of its servants in the same cases and in the same manner and form of action in which other masters are liable for the torts of their servants: Taylor on Private Corporations, 4th ed., sec. 335. Some of the courts seem at one time to have been inclined to hold that a master could not be held liable for the willful torts of his servant, because, it was said, if the servant through anger or malice committed an assault upon a person, he ceased for the time being to occupy the position of servant, and acted independently; that inasmuch as he was not authorized to commit an assault, he did not represent the master in that act, but acted as an individual, the master therefore being not liable either in case or in trespass. This argument has long since been exploded. The theory that one may be a servant one minute, and



the very <sup>417</sup> next minute get angry, commit an assault, and in that act be not a servant, was too refined a distinction. I have read a great deal upon the subject, and believe that the law has been definitely settled contrary to this fine-spun theory, and that the courts have settled down to the common-sense doctrine that a master is liable for the torts of his servant, committed in the course of the servant's employment, even though the tort be a willful one: 34 Am. Law Reg., N. S., 120. In many, probably in a large majority, of the instances in which masters have been held liable for the torts of their servants the liability has been made to rest upon the negligence of the servant and the negligence of the master in employing a careless servant, or upon the master's negligent failure of duty. In such cases the master is held to be liable in an action on the case. But it is also held that the master may, in certain cases where liable for the tort of his servant, be held answerable in an action of trespass *vi et armis*. The master is liable in trespass for the willful torts of his servant, committed in the course of the servant's employment and in and about the master's business. Our Civil Code, section 3817, provides that "every person shall be liable for torts committed by his . . . servant by his command or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary." In the case of Eastern Counties Ry. Co. v. Broom, 6 Ex. 314, it was said (page 325): "We are all clearly of opinion . . . that an action of trespass for assault and battery will lie against a corporation, whenever the corporation can authorize the act done and it is done by their authority." And in a Massachusetts case we find the following: "Where a master employs a servant to do an act which involves the use of force against the person or property of another, and the servant, in the course of his employment, uses force in a manner or to an extent unlawful and unjustifiable, both are answerable as trespassers": *Holmes v. Wakefield*, 12 Allen, 580, 90 Am. Dec. 171. See, also, *Moore v. Fitchburg R. R. Corp.*, 4 Gray, 465, 64 Am. Dec. 83; *Hewett v. Swift*, 3 Allen, 420; *Howe v. Newmarch*, 12 Allen, 55; *St. Louis R. R. Co. v. Dalby*, 19 Ill. 353; 6 Thompson on Corporations, sec. 7394.

The courts have not all been clear as to whether the master and servant can be sued jointly in trespass for the tort of the servant. The doubt has been as to whether, under the common-law pleading, the master was not liable in trespass on the case and the servant <sup>418</sup> liable in trespass, so that the two could not

be joined in the same action. Under our more rational system of code pleading we have abolished the distinction between trespass and trespass on the case, and there is no reason why the two should not be joined in one action. If the plaintiff has a cause of action against one person, all he now has to do is to state it plainly and distinctly; if he has a cause of action against two, he is required to do no more. If both the master and the servant are liable for the same willful tort of the servant, why, under our system of code pleading, should they not be joined in the same action, although at common law one would be liable in case and the other in trespass? But however this may be, it is contended that the constitutional provision relied upon to give the right to sue the railroad company in the county of McCowan's residence applies only to "joint trespassers," and that the master and servant are not "joint trespassers" if one is liable in case and the other in trespass. Conceding this to be true, we think that in the present case the railway company, the conductor, and McCowan were all joint trespassers and all jointly or severally liable in an action of trespass *vi et armis* at common law. This must follow logically from what has been said above to show that in a case like the present the corporation is liable in trespass for the willful tort of its servant done in and about the master's business and in the course of the servant's employment. This view is supported by courts whose decisions are entitled to the highest respect and consideration, and by eminent text-writers. In *Moore v. Fitchburg R. R. Corp.*, 4 Gray, 465, 64 Am. Dec. 83, it was said: "There is no difficulty in joining the corporation with their servant in the same action." In *Hewett v. Swift*, 3 Allen, 420, it was held that, "where the corporation gives an order to a servant to do an act which implies the use of force and personal violence to others, if the servant in the execution of that service goes beyond the proper limits as to the use of force, and commits a trespass by unjustifiable violence, and inflicts an injury by a blow or kick upon the person attempted to be removed, the corporation will be liable in an action of trespass therefor"; and that "a joint action would lie against the corporation and their servant." This decision was followed in *Holmes v. Wakefield*, 12 Allen, 580, 90 Am. Dec. 171. See, also, *Brokaw v. New Jersey etc. R. R. Co.*, 32 N. J. L. 328, 90 Am. Dec. 659, wherein it was held that an action of trespass for an assault and battery would lie jointly against an individual and a corporation whose <sup>419</sup> servant participated in it: *Favorite v. Cottrill*, 62 Mo. App. 119; *Ullman*

v. Hannibal etc. R. R. Co., 67 Mo. 118; Wright v. Compton, 53 Ind. 337; 5 Thompson on Corporations, secs. 6288, 6289; Cooley on Torts, 2d ed., 138 (\*120); Wood on Master and Servant, 586 et seq.; Dicey on Parties, 2d Am. ed., 490 (m. p. 466). These authorities show that a master and servant may be jointly sued in trespass for a willful and affirmative wrong committed by the servant within the scope of his employment. This is upon the theory that in trespass all are principals and the act of one the act of all. If, in the present case, the company and its servant, the conductor, could have been joined, we see no reason why the company could not be, upon the same principle, joined with the third person who participated with the conductor in committing the trespass. The conductor was joint trespasser with the company and with such third person, and it must follow that the third person and the company were also joint trespassers. If the conductor of a railroad train undertakes without justification to eject a passenger, and another passenger, voluntarily or at the request of the conductor, joins in the illegal act and thereby commits an assault, the assisting passenger, the conductor, and the company are all principals, and there can be no reason why all cannot be sued in one and the same action. If the conductor, who represented the company, and McCowan were joint trespassers, then under the constitutional provision stated above the action would lie in the county of the residence of either, and the suit was properly brought in Bibb county wherein one of the defendants resided.

3. In trying the plea to the jurisdiction of the court it was not proper to go into the merits of the case. The railroad company sought to show that McCowan was not liable to the plaintiff, and that the courts of Bibb county had, therefore, no jurisdiction of the company. We think that this is a matter for determination on the final trial of the case. Of course, if it should appear upon that trial that McCowan, the resident defendant, was not liable in this action, there could be no judgment against either him or the railroad company: *Hamilton v. Du Pre*, 111 Ga. 819, 35 S. E. 684.

Judgment affirmed.

All the justices concurring.

IN THE SUBSEQUENT CASE of *Lynch v. Florida Central etc. R. R. Co.*, 113 Ga. 1105, 39 S. E. 411, the railroad company was held not liable for an assault and battery committed by its station agent and another upon a third person. In this case it appeared that the third person was driving his wagon upon the station



grounds, in violation of the rules of the company, and was repeatedly ordered to desist, but paid no heed to such requests, and sought advice from other employes of the company who were not shown to have had any authority over the grounds. The third person went to the father of the station agent to complain of his son's treatment of him, and together they went to the station to see the agent, where the father and the plaintiff engaged in an altercation in which the agent participated, and the plaintiff was injured by the assault and battery of both the agent and his father. The railroad company was held not to be liable, since the plaintiff did not seek the company's agent because of any business he had with him as agent, but for the purpose of adjusting a personal grievance. It was entirely a personal matter between the plaintiff, the father, and the agent, and the fact that it was not adjusted in a manner agreeable to the plaintiff was not the fault of the company.

At the time of the quarrel and the injury, the agent was acting upon his individual responsibility, and not within the scope of his employment. The opinion in no way questions the doctrine of the principal case, but clearly shows that such doctrine is not applicable to the facts before it, and quotes from *Columbus etc. Ry. Co. v. Christian*, 97 Ga. 56, 25 S. E. 411, as to the liability of a railroad company for the torts of its agents: "For the wrongful act of an employe of a railroad company resulting in injury to another, committed while engaged in the performance of the company's business in the line of his duty, the company is liable. But if while so engaged, upon some private feud previously existing or suddenly arising, wholly disconnected with his duties as such employe and not pertaining to the business then in process of transaction (the company then not owing to the other the duty of personal protection), he commit injury upon the person of another, the company would not be liable." And quoting from *City Elec. Ry. Co. v. Shropshire*, 101 Ga. 37, 28 S. E. 508, the opinion says: "One who voluntarily, and by his own misconduct, places it beyond the power of the master to protect him, surely cannot complain of an omission so to do. Especially is this true where he practically invites the master's servant to disregard and abandon his official duties and enter into a personal encounter on his own account and upon his individual responsibility." To the same effect are cited the cases of *Georgia R. R. & B. Co. v. Richmond*, 98 Ga. 495, 25 S. E. 565, and *Georgia R. R. & B. Co. v. Hopkins*, 108 Ga. 324, 75 Am. St. Rep. 39, 33 S. E. 965.

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**A Master is Liable for the Willful and Malicious**, as well as for negligent, acts of his servant, done in the course of his employment and within the scope of his authority: *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 71 Am. St. Rep. 729, 54 N. E. 471. See the discussion of this principle in the monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 85-89.

**Master and Servant May be Joined in one action to recover for injuries suffered from the latter's negligence:** *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 48 Am. St. Rep. 911, 63 N. W. 93.

## COLUMBUS v. GRIGGS.

[113 Ga. 597, 38 S. E. 953.]

**NEGLIGENCE — CONTRIBUTORY — UNSAFE STREET—LIABILITY OF CITY.**—A traveler who knowingly and deliberately takes the risk of driving over a defective portion of a street, which a city has negligently failed to put in safe condition, cannot recover for injuries sustained, where the danger is so plain and obvious that driving over the place in question, in and of itself, amounts to a want of ordinary care and diligence.

F. D. Peabody and L. F. Garrard, for the plaintiff in error.

McNeill & Levy, contra.

<sup>597</sup> LUMPKIN, P. J. This case comes here upon exceptions to a judgment overruling a motion for a new trial, which contains many grounds. It is unnecessary to pass upon them in detail, for the verdict was wholly unwarranted by the evidence, and it is apparent from the record that the case cannot at another hearing present any aspect materially different from that in which it now appears. Dr. Griggs brought an action against the city of Columbus, for personal injuries resulting from its alleged negligence in failing to put in a safe condition for travel a portion of a street which had been rendered unsafe by reason of certain work done therein, with the city's permission, by a railway company. Pending the action the plaintiff died, and his administratrix was made a party in his stead. Taking the most favorable view of the evidence which could be fairly entertained in her behalf, it affirmatively appeared that it was palpably and obviously dangerous to attempt to drive at night over that place in the street at which the injury occurred. Nevertheless the deceased, with full and accurate knowledge of this fact, voluntarily, on a very dark night, accompanied another, who had like knowledge, in a buggy which the latter undertook to drive over that place. As a result the buggy was thrown over an embankment and Dr. Griggs was seriously injured. Both occupants of the buggy were perfectly familiar with the situation and fully aware of the danger. They actually discussed it but a few minutes before the catastrophe happened. Not only <sup>598</sup> was the night exceedingly dark, but the ground was covered with snow, which circumstance, the record discloses, manifestly increased the hazard and actually contributed to bringing about the casualty. Granting that the negligence of the city was fully established, it is certainly true that

Dr. Griggs and his companion were wanting in ordinary care and diligence. They both knowingly and deliberately took a risk the danger of which, to any person of common prudence, would have been plain and obvious. It further appeared that they did so without excuse, for there was no emergency constraining them to travel over the dangerous place, and they had the choice of other routes to their destination, some of which were perfectly safe, and any one of which was, under the circumstances, unquestionably safer than that which they chose. The law by which this case should be controlled was fully discussed by the writer in *Samples v. Atlanta*, 95 Ga. 110, 22 S. E. 135. It is, in substance, that a traveler exercising due care may, although he knows there is some danger in driving over a defective portion of a street which a city has negligently failed to put in safe condition, recover for injuries thus sustained, unless the danger is obviously of such a character that driving over the place in question, in and of itself, amounts to a want of ordinary care and diligence. Certainly, a man cannot heedlessly rush into grave peril, of the existence of which he is perfectly aware, and then hold anyone else, whether negligent or not, responsible for the consequences.

The court below ought to have granted a new trial on the ground that the verdict was not warranted by the evidence.

Judgment reversed.

All the justices concurring.

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**Defective Street—Contributory Negligence.**—Although a person injured by reason of a defect in a street had knowledge of such defect, that fact will not, of itself, deprive him of his right of action; but such knowledge, with all the other facts, is to be considered by the jury in determining whether he was guilty of contributory negligence: *Frankfort v. Coleman*, 19 Ind. App. 368, 65 Am. St. Rep. 412, 49 N. E. 474. See, further, *Church v. Howard City*, 111 Mich. 298, 66 Am. St. Rep. 396, 69 N. W. 651; *McQuillan v. Seattle*, 10 Wash. 464, 45 Am. St. Rep. 799, 38 Pac. 1119.



## MALONE v. ADAMS.

[113 Ga. 791, 39 S. E. 507.]

**ESTATES OF DECEDENTS—DECLARATIONS TO PROVE PEDIGREE.**—THE GENERAL RULE is, that the declarations of a deceased person are not admissible in evidence on a question of pedigree, until there is some proof outside of such declarations that the declarant was in fact a member of the family about which he was speaking.

**ESTATES OF DECEDENTS—DECLARATIONS TO PROVE PEDIGREE.**—The declarations of a decedent, whose estate is in controversy, that he was related to the one who claims his estate, are admissible in evidence without other proof of the fact of relationship.

R. J. Jordan, for the plaintiff in error.

Arnold & Arnold and Abbott & Abbott, contra.

<sup>791</sup> LUMPKIN, P. J. A paper purporting to be the last will and testament of Mattie Adams, deceased, was offered for probate by T. H. <sup>792</sup> Malone as executor. By this instrument the greater part of the property therein mentioned was given to one Lizzie Reed, who was not related to the alleged testatrix. A caveat was filed by one Mattie Adams, who claimed to be the niece and only heir at law of the decedent. The grounds of the caveat were, that at the time of the execution of the paper she did not have sufficient mental capacity to make a will, and that the execution of the paper offered for probate was procured by undue influence and duress practiced upon the decedent by the subscribing witnesses and by Lizzie Reed, the beneficiary therein named. The trial of the case on appeal resulted in a verdict finding that the paper in question was not the will of the decedent. The propounder moved for a new trial, which was denied him, and he excepted. The controlling question presented by his motion for a new trial was whether or not certain declarations of the decedent, to the effect that she was related by blood to the caveatrix, were admissible in evidence, the ruling of his honor of the trial bench being that they were. Such other points as are presented for our determination will be very briefly referred to after disposing of this question.

1. The substance of the declarations of the decedent which the court allowed to be proved was that the caveatrix was her niece. It was insisted that under the ruling of this court in *Greene v. Almand*, 111 Ga. 735, 36 S. E. 957, these declarations

were inadmissible. It was in that case held that: "Sayings of a deceased person cannot be rendered competent evidence on a question of pedigree by merely proving that such person said he was a kinsman or relative of the person whose pedigree is the subject matter of the inquiry. The fact of relationship must be shown by other evidence." The question now in hand is altogether different. There was no attempt to prove that any deceased person, while in life, had declared that he or she was related by blood or marriage to Mattie Adams, the deceased, and, upon the strength of such a declaration, to introduce another and additional declaration to the effect that there also existed a relationship between her and the living Mattie Adams. The declarations sought to be proved in the present case were those of the alleged testatrix whose estate was in controversy. While she was not, of course, related to herself by blood or marriage, she certainly was a member of the family of individuals with whom she was connected by blood or affinity, and no proof <sup>793</sup> was required to establish the fact that she was a member of that particular family. We are, therefore, of the opinion that the evidence as to her declarations was admissible under section 5177 of the Civil Code, which reads as follows: "Pedigree, including descent, relationship, birth, marriage, and death, may be proved either by the declarations of deceased persons related by blood or marriage, or by general repute in the family, or by genealogies, inscriptions, 'family trees,' and similar evidence."

A case peculiarly in point is that of *Wise v. Wynn*, 59 Miss. 590, 42 Am. Rep. 381. One Charles Wise, who had lived in Mississippi for forty years and whose antecedents were entirely unknown, died intestate. His supposed heirs at law proved that they were the children of one Thomas Wise, of a named town in Amelia county, Virginia; that their father had a younger brother Charles, who left that state forty years previously, and that nothing had been heard of him since. They then sought to introduce the testimony of two witnesses to the effect that Charles Wise, whose estate was in question, had told them that he had a brother Thomas, who lived in the town above mentioned, and that he himself had lived there. The court held that these declarations were admissible. Judge Chalmers, who delivered the opinion in that case, discusses the question so clearly and so forcibly that we cannot attempt to better express our views in regard thereto than by quoting and adopting as our own the following admirable presentation by him of the law on the subject: "The general rule undoubtedly

is, that before hearsay declarations in matters of pedigree can be introduced in evidence, some proof dehors the declarations must be made that the declarant was in fact a member of the family about which he was speaking. It was unanimously so ruled by all the judges in the Banbury Peerage Case, 2 Selw. N. P. 764, where the petitioner sought to introduce in evidence the statements and depositions contained in a chancery litigation conducted more than one hundred and fifty years before, in which an ancestor of the petitioner styled himself, and was styled by those who professed to belong to the family, the legitimate son of A B. It was held that such statements were not admissible, though upon a question of pedigree, until it could be shown by proof aliunde that those making these statements actually were members of the family as to which the claim was preferred. The same doctrine is announced in *Monkton v. Attorney General*, 2 Russ. & 794 M. 147, though it may perhaps be doubted whether the conclusion reached in that case does not offend against the doctrine. But in these and many other cases of a similar character which might be cited, the attempt was to set up some right derived through the declarant, and to establish that right by his own statements as to the pedigree of the family of which he claimed to be a member. It seems manifest that this cannot be done without precedent proof from other sources that he is what he claims to be, to wit, a member of the family. Thus, if Charles Wise had married here and left children, it is clear that those children could not have claimed any interest in the estate of Thomas Wise, in Virginia, by virtue alone of their father's statement that Thomas was his brother. But how is it when the case is reversed, and a plaintiff is seeking to reach the estate of the declarant by evidence of what he said with reference to his family and kindred? It is quite clear that I cannot establish my right to share in the estate of A by proof alone of the fact that my father declared in his lifetime that A was his brother; but may I not do so by showing that A himself so declared? Upon this question we find a singular dearth of authorities. In *Adie v. Commonwealth*, 25 Gratt. 712, a case strikingly like this in all its features, testimony of this character seems to have been admitted without objection, and so, also, in *Cuddy v. Brown*, 78 Ill. 415. In *Moffit v. Witherspoon*, 10 Ired. 185, persons who claimed to be the nephews and nieces of Mrs. Donahoe in an ejectment suit brought after her death to recover certain real estate belonging to her during her life, were permitted to prove that she had declared,



many years before her death, that the mother of the plaintiffs was her only sister, and no other proof of heirship than this seems to have been offered. In *Shields v. Boucher*, 1 De Gex & S. 40 (a case to which we have not had access, but which is referred to at length in Wharton on Evidence, section 208, note 4), Sir Knight Bruce expressed the strong conviction that, in a controversy purely genealogical, declarations made by a deceased person, as to where he or his family came from, of what place his father was designated, and what occupation he followed, would be admissible, and might be most material evidence for the purpose of identifying and individualizing the person and family under discussion. Independently of these or any authorities, we think, *ex necessitate rei* and as a matter of common sense, that declarations such as were offered here and <sup>795</sup> under the circumstances here existing, should always be received in evidence. They stand to some extent upon the footing of declarations against interest, or of what Mr. Wharton calls 'self-disserving declarations.' If they be not admitted, there must be in many cases a failure of justice. No man who knew Charles Wise in Virginia ever saw him here, and no man who knew him here ever saw him in Virginia; and if we reject his own statements as to who he was, and whence he came, these inquiries must remain forever unanswered. If such be the rule of law, it must be impossible legally to establish the identity of very many travelers who die among strangers in distant lands, although in point of fact there may not be in any man's mind the slightest doubt as to who they were."

2. It was further urged before us that there was not sufficient evidence at the trial below either to warrant any instructions with regard to undue influence, or to support a verdict that the testamentary paper was a result of such influence. An examination of the record satisfies us that these contentions are not meritorious.

Judgment affirmed.

All the justices concurring.

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**Evidence of Pedigree.**—Declarations of deceased members of a family, made ante litem motam, are received to prove family relationship, including marriages, births, and deaths, and the facts necessarily resulting from those events. But they are not admissible until it is first shown that the person who made them was a member of the family. Slight proof of this relationship, however, is sufficient: *Young v. Shulenberg*, 165 N. Y. 385, 80 Am. St. Rep. 730, 59 N. E. 135. See, also, *Estate of Williams*, 128 Cal. 552, 79 Am. St. Rep. 67, 61 Pac. 670.

## SCOTT v. MADDOX.

[113 Ga. 795, 39 S. E. 500.]

**WILLS—LOST—PRESUMPTION.**—Where a will is lost or destroyed, the presumption is that it was revoked by the testator. This presumption can be rebutted only by proof that the loss or destruction was subsequent to the testator's death, or without his consent.

**WILLS—LOST—PROOF—EVIDENCE.—THE EXECUTION** of a lost will must be proved by the subscribing witnesses, but its contents, its loss or destruction, and the facts necessary to rebut the presumption of revocation by the testator may be shown by any other competent evidence.

**WILLS—LOST—PROOF OF DESTRUCTION.—MERE OPPORTUNITY** to destroy a will on the part of persons interested in establishing intestacy is not sufficient to rebut the presumption that the testator destroyed it for the purpose of revocation.

**WILLS—PROOF OF DESTRUCTION.—DECLARATIONS OF AN HEIR** of the testator, who is not a party to the record, that he destroyed the will after the testator's death, are merely hearsay and not admissible as against other persons interested in the case.

J. N. Glenn, H. C. Jones, and Green & McKinney, for the plaintiff.

Candler & Thompson, for the defendants.

<sup>796</sup> **COBB, J.** Varner filed a petition in the court of ordinary, alleging that Ezekiel Reeves had departed this life testate, and that his last will was destroyed subsequently to his death, and praying that a copy of the will be established and admitted to record. To this petition certain persons, describing themselves as the heirs at law of Ezekiel Reeves, filed a caveat, setting up that at the time of the execution of the alleged will the testator was not of sound mind, that in executing the paper he acted under the undue influence of Varner, and that the failure to find the paper was due to the fact that the testator had destroyed it with the intention of revoking it. The court of ordinary refused to admit to record the paper alleged to be a copy of the will, and the case was appealed to the superior court. On the trial there, at the conclusion of the evidence introduced by the propounders, the court passed an order dismissing the appeal and sustaining the judgment of the court of ordinary. This judgment was reversed by the supreme court, and a new trial ordered: *Scott v. McKee*, 105 Ga. 256, 31 S. E. 183. While the case was pending in the supreme court Varner died, and two of the legatees under the alleged will were made parties

in this court in his place. When the case came on for trial a second time in the superior court, after the introduction of the testimony in behalf of the propounders, the court held that the evidence was insufficient to authorize the establishment of the paper as the last will of Ezekiel Reeves, and entered a judgment denying the application to probate the copy will and refusing to allow it to be admitted to record. The case is here again upon a bill of exceptions containing assignments of error upon the ruling just referred to, and upon other rulings made during the progress of the trial.

1, 2. The code declares: "If a will be lost or destroyed subsequent to the death, or without the consent of the testator, a copy of the same, clearly proved to be such by the subscribing witnesses and other evidence, may be admitted to probate and record in lieu of the original; but in every such case the presumption is of revocation by the testator, and that presumption must be rebutted by <sup>797</sup> proof": Civ. Code, sec. 3289. It seems that there is nothing in this statute which is in conflict with the general rule on the subject therein dealt with, but that it is merely declaratory of the law as it stood at the time of the adoption of the code: See Pritchard on Wills, sec. 50, p. 51, n. 3. In *Kitchens v. Kitchens*, 39 Ga. 168, 99 Am. Dec. 453, the section of the code just quoted was construed, and it was there held that, while the execution of the will must be proved by the three subscribing witnesses in the same manner as in the probate of a will in solemn form, the contents of the paper, the destruction or loss of the same, and the facts necessary to rebut the presumption of revocation by the testator might be shown by any other evidence which would be sufficient to satisfy the conscience of the jury that the will was executed as testified by the subscribing witnesses, and was lost or destroyed since the death of the testator, or without his consent before his death. The rule laid down in *Kitchens v. Kitchens*, 39 Ga. 168, 99 Am. Dec. 453, was followed and approved in *Mosely v. Carr*, 70 Ga. 333. See, also, *Burge v. Hamilton*, 72 Ga. 624; *Gillis v. Gillis*, 96 Ga. 17, 51 Am. St. Rep. 121, 23 S. E. 107. In the present the three subscribing witnesses to the will were produced and sworn, and their testimony was such that the jury would have been authorized to find that the testator had executed a paper which he declared to be his last will, and that he was at the time of its execution mentally capable of making a will. There was also evidence from which a jury could have found that the copy will produced at the trial was a correct copy of the paper proved by the sub-



scribing witnesses to have been executed as a will. It was shown that the paper so executed could not be found after the death of the testator. This placed upon the propounders the burden of proving that the paper was destroyed after the death of the testator, or that, if destroyed during his life, its destruction was without his consent. The only evidence in the record which can be looked to to determine this question is in substance as follows: The will was executed by the testator and then delivered to Varner, the nominated executor, who carried it away with him. After this the testator sent for the will, and it was returned to him by Varner. So far as the record discloses, the will was never seen by anyone after its return. A few days before his death the testator told Varner that the will was in his room in a chest, which he pointed to with his finger, and said to Varner that he wanted him to see that the provisions of the will were carried <sup>798</sup> out after the testator's death. The testator was in an unconscious condition for several days before he died, but the evidence does not show that he fell into this condition immediately after the statement to Varner just referred to. The paper which had been executed as a will not being in existence at the time the application for the probate of it was made, the propounders were met at the threshold of their case with the presumption that the paper had been revoked by the testator, and it was incumbent upon them to overcome this presumption by proof. The rule is thus stated by Mr. Pritchard in his work on Wills: "When a will cannot be found after the death of the testator, there is a strong presumption that it was destroyed or revoked by the testator himself, and his presumption stands in the place of positive proof. He who seeks to establish a lost or destroyed will assumes the burden of overcoming this presumption by adequate proof. It is not sufficient for him to show that persons interested to establish intestacy had an opportunity to destroy the will. He must go further and show, by facts and circumstances, that the will was actually fraudulently or accidentally lost or destroyed, against, and not in accordance with, the wishes and intention of the testator": Pritchard on Wills, sec. 50, subsec. 2. Mr. Schouler says: "If a will last traced to the testator's custody cannot be found at his death, the presumption that he destroyed it for the purpose of revocation outweighs the probability of its fraudulent and criminal destruction by another, when unsupported by any evidence except that of opportunity, though this latter circumstance is always worthy of consideration with other proof": Schouler on

Wills, 3d ed., sec. 402, p. 446. See, also, 1 Jarman on Wills, Bigelow's 6th ed., \*125; Underhill on Wills, sec. 272; Page on Wills, sec. 442. Did the propounders carry the burden which the law placed upon them of showing by sufficient proof that the testator had not revoked the will, and that the failure to find it was due to its destruction subsequently to his death, or in his lifetime without his consent? It does not seem that the evidence was sufficient to overcome the presumption which arises in such cases. It not having been shown that the testator lapsed into a state of unconsciousness immediately after the declaration to Varner that he desired his will to be carried out and that the paper would be found in a certain place, the evidence in behalf of the propounders did not preclude the possibility of the testator's having formed an intention to revoke <sup>799</sup> the will and carried such intention into effect by having the same destroyed between the time that he made the statement to Varner and the time that he lapsed into the state of unconsciousness which preceded his death. This being so, there was no error in refusing to establish the copy offered as the last will of Ezekiel Reeves and to allow the same to be admitted to record.

3. The propounders offered to prove that a daughter of the testator had said that she had destroyed her father's will after his death. The daughter referred to was not a party to the case. The court refused to admit the testimony, and we think the ruling was clearly right. The declarations of this daughter were merely hearsay as against other persons interested in the case, and as she was not a party to the record, they were not, in the present controversy, admissible under any rule of which we are aware.

4. The record contains assignments of error upon the refusal of the court to allow the propounders to ask certain witnesses different questions that are contained in the record. As it is not disclosed what answers were expected to these various questions, these assignments present no question for decision: *Central Ry. Co. v. Bond*, 111 Ga. 15, 36 S. E. 229, and cases cited.

Judgment affirmed.

All the justices concurring.

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**Lost Will.**—A will is presumed to have been destroyed, with intent to revoke it, from proof that it cannot be found after the testator's death: *Collyer v. Collyer*, 110 N. Y. 481, 6 Am. St. Rep. 405, 18 N. E. 110; *Behrens v. Behrens*, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209. As to what proof will overcome this presump-

tion, see the monographic note to *Graham v. Burch*, 28 Am. St. Rep. 347, 348.

**Lost Will—Proof of.**—Though the substance of a destroyed or lost will may be admitted to probate, it must be shown by the clearest and most satisfactory evidence that the instrument was properly executed and was not revoked by the testator, and what were its contents. In some jurisdictions the execution and contents may be proved by a single witness; in others, the statute requires more than one: *Note to Tynan v. Paschal*, 84 Am. Dec. 628-630; *Dickey v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130; *Matter of Page*, 118 Ill. 576, 59 Am. Rep. 395, 8 N. E. 852; *Kitchens v. Kitchens*, 39 Ga. 168, 99 Am. Dec. 453. Consult, also, *Jones v. Casler*, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812; *In re Ellis' Estate*, 55 Minn. 401, 43 Am. St. Rep. 514, 56 N. W. 1056.

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## WOODSIDE v. LIPPOLD.

[113 Ga. 877, 39 S. E. 400.]

**MORTGAGES—CANCELING SATISFACTION—MERGER.**—Where a mortgagee takes a conveyance of the mortgaged premises, the mortgages not being canceled, and subsequently conveys to one who takes no assignment of the mortgages, and who requests that the mortgages be satisfied and canceled of record, in order to clear the record of liens against the property, an unequivocal intention is expressed that the mortgages should no longer exist, but should merge in the title, and equity will not restore the liens of the mortgages in order to give them priority over an intervening mortgage.

**MISTAKE OF FACT—RELIEF.—EQUITY** will grant relief against a mistake of fact only when it is of such a nature that it could not, by reasonable diligence, have been avoided at the time, but relief will not be given against the results of inexcusable negligence.

One Mrs. Venable executed two mortgages to the American Trust and Banking Company. Subsequently a mortgage on the same property was executed to the defendant. Later the mortgagor conveyed in fee simple to the trust company, the mortgages not being canceled, which conveyed to the plaintiff Woodside, at whose request the two mortgages were canceled of record, the plaintiff taking no assignment of the mortgages. Subsequently the defendant brought suit to foreclose, and the plaintiff filed the present petition to enjoin the foreclosure, to cancel the defendant's mortgage, and to restore the trust company's mortgages to their priority. Verdict for the defendant.

Ellis & Ellis, Gray, Brown & Randolph, and C. W. Smith, for the plaintiffs.

Charles A. Read, for the defendants.



**879 FISH, J.** This case turns upon the question whether, under the facts stated, equity will restore the liens of the mortgages canceled by the American Trust and Banking Company to their original priority over the mortgage held by Lippold. Under the view we take of the matter, it is unnecessary to determine whether, according to the equitable doctrine relating to merger, the liens of the mortgages held by the banking company were merged in the title when Mrs. Venable conveyed the premises to the company, or were extinguished by the settlement of the mortgage debt in that transaction; for, in our opinion, there can be no doubt that the liens of such mortgages were absolutely extinguished when at the request of Woodside, who had purchased the mortgaged property from the banking company and taken a warranty deed thereto, the banking company made the entries of full satisfaction upon such mortgages and had them canceled of record, this being done in order to clear the record of liens against the property. If up to the date of Woodside's purchase there had been no merger, and the banking company's mortgages were then alive, and if the banking company and Woodside intended when he purchased that he should take all the interests and rights which the banking company held in and to the property, and if under such circumstances no merger or extinguishment of the banking company's mortgages occurred, in equity, when Woodside acquired the title, yet when the banking company subsequently, and at his instance and request, deliberately marked the mortgages satisfied and had them canceled of record, they never having been assigned to Woodside, there was then manifested an express and unequivocal intention on the part of both Woodside and the banking company that the liens of its mortgages should no longer exist—that they should merge in the title which Woodside had acquired—and such intention became effective and the mortgages were extinguished. It has been uniformly held, in the application of the equitable doctrine concerning merger, that the intention, when expressed, of the person in whom the two estates or interests meet must control: 2 Pomeroy's Equity Jurisprudence, 2d ed., sec. 791; 15 Am. & Eng. Ency. of Law, 1st ed., 325; *Ferris v. Van Ingen*, 110 Ga. 111, 35 S. E. 347. In *Weidner v. Thompson*, 69 Iowa, 36, 28 N. W. 422, the mortgagor conveyed the mortgaged property to the mortgagee, who conveyed <sup>880</sup> it to a third person, who gave his note in substitution of the note of the mortgagor, and the holder of the mortgagor's note delivered it to such third person, marked "paid," and canceled the mortgage of record. A judgment was

rendered against the mortgagor after his execution of the mortgage, but prior to his conveyance to the mortgagee. In an action by the purchaser from the mortgagee to have the cancellation of the mortgage set aside, on the ground that it was not the purpose of the parties to cancel it, and that it was against their interests to do so, it was held that the cancellation could not be set aside. In the opinion Beck, J., said: "It cannot be doubted that the law will look to the intention of the parties, and the interest of the plaintiff, in order to determine whether the mortgage is to be regarded as paid and canceled. The fact that it was canceled of record will not avail to discharge the mortgage, if the parties intended that the lien should continue, and the plaintiff's interests demanded it. But if the parties intended to discharge the mortgage, and the debt was in fact paid, and not transferred to the plaintiff, the cancellation must stand, and the lien be regarded as discharged. The mere fact that plaintiff's interests would have been better protected by permitting the lien to stand will not control against the intention, clearly established. The law will permit a party in such a case, as in others, to act and contract in a manner which would not result to his interest": See *Campbell v. Carter*, 14 Ill. 286.

The satisfaction and cancellation of the banking company's mortgages seem to have been made under a mistake of fact, that Lippold had abandoned his mortgage and would make no effort to foreclose it. While equity will grant relief against a mistake of fact, it is well established that such a mistake must be of such a nature that it could not, by reasonable diligence, have been avoided at the time. Equity will not relieve against the results of culpable and inexcusable negligence. By the exercise of the slightest diligence on the part of Woodside and the banking company, they could have readily ascertained the intention of Lippold in reference to the enforcement of his mortgage. It does not appear that he or his attorney ever intimated that the mortgage had been abandoned. The attorney for the banking company gave as a reason for the satisfaction and cancellation of the company's mortgages that the attorney for Woodside reported that he had had an interview with the attorney <sup>881</sup> for Lippold, and that Lippold would not enforce his mortgage. Equity will not grant relief under such circumstances. The verdict being demanded by the undisputed facts, there was no error in refusing to grant a new trial.

Judgment affirmed.

All the justices concurring.

**Merger of Estates.**—Whether a merger results from the possession by the same person at the same time of two estates of different rank in the same property is generally a question of the owner's intention. He may elect to keep them separate: *Longfellow v. Barnard*, 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255. This principle is applied to the estates of mortgagor and mortgagee in *Title Guarantee Co. v. Wrenn*, 35 Or. 62, 76 Am. St. Rep. 454, 56 Pac. 271. Consult, also, *Howard v. Clark*, 71 Vt. 424, 76 Am. St. Rep. 782, 45 Atl. 1042.

## GUERNSEY v. PHINIZY.

[113 Ga. 898, 39 S. E. 402.]

**FIXTURES.—BRICK, LUMBER, AND OTHER PERSONALTY**, used for the construction of a substantial and permanent building upon the land, become a part of the realty.

**FIXTURES — RECONVERSION INTO PERSONALTY.**—**BRICK AND LUMBER** used in the construction of a house become a part of the land, and so remain until severed and reconverted into personalty by the owner. Hence, if a house is accidentally destroyed and falls to the ground, the brick and lumber remain a part of the land as long as the owner leaves them as they have fallen, and until he does some act evidencing his intention to reconvert them into personalty.

**INTEREST ON JUDGMENTS—VERDICT.**—Under the statutes of Georgia, judgments bear interest only from the time they are entered and signed, and not from the date of the verdict, and the same rule applies to a decree in equity for a specific sum of money.

**COSTS—DISCRETION OF JUDGE.—IN EQUITY** the question as to which party shall pay the costs rests in the discretion of the judge, and this discretion will not be interfered with where it has not been abused.

Joseph B. & Bryan Cumming, for the plaintiffs in error.

Joseph R. Lamar, contra.

<sup>898</sup> **SIMMONS, C. J.** It appears from the record that Mrs. Guernsey and Hervey S. Hoadley owned a lot of land in the city of Augusta. On the lot was a brick building. They offered the property for sale through an agent, and by him it was sold to Phinizy at the <sup>899</sup> price of sixteen thousand dollars. Prior to this the vendors had given a security deed to Stetson, the latter giving them a bond for titles to reconvey upon the payment of the money loaned. By the contract of sale this security deed was to be paid off and the property reconveyed before Phinizy was to pay for it in full. Considerable delay occurred by reason of the loss of the bond for titles made by Stetson, the latter refusing to reconvey until the bond was produced or a bond of



indemnity given him. Pending the negotiations the house was accidentally destroyed by fire. After the fire it appears that the vendors undertook to rescind the contract of sale. Phinizy refused to rescind, and tendered for the lot a certain amount of money, less than the original contract price. This was refused, the vendors demanding the full contract price. Thereupon the vendee filed an equitable petition, setting out these facts, and praying a specific performance of the contract, and that a deduction be made because of the destruction by fire of the improvements upon the lot. Upon the trial the jury found that, at the time the contract was entered into, the land itself, without the improvements, was worth eight thousand dollars, and that since the fire the vendee had tendered that amount for the land. The court decreed that the plaintiff should pay to the vendors the sum of eight thousand dollars, and that they should make him a deed to the land and remove therefrom certain encumbrances, including that of Stetson. This verdict and decree were not excepted to by either party, but, between the rendition of the verdict and the making of the decree, a dispute arose as to the ownership of the brick left upon the lot after the fire. It appears that some of these brick constituted a part of the remaining foundations of the building, while the remainder were part of the debris which had fallen and which remained on the land after the fire. The defendants amended their answer, after verdict, by setting out these facts and praying that the brick be decreed to belong to them. Phinizy resisted this by a demurrer and by an answer. The court decided that the brick belonged to Phinizy. The court also decreed that the eight thousand dollars bear interest from the date of the decree, and not from the time of the rendition of the verdict, some time having elapsed between the verdict and the decree. It was also decreed that the defendants should pay all costs. The defendants excepted to the decree as to the ownership of the brick, as to the interest, and as to the costs, and by writ of error brought these questions to this court for review.

900 1. Whatever may be the law of fixtures with regard to articles not firmly annexed to the soil, it is clear that when the owner of land uses brick, lumber, and other personalty for the construction of a substantial and permanent building upon his land, they become a part of the realty. Brick, though personal property before they are put in the house, become afterward attached to and a part of the land and so remain until severed and reconverted into personalty by the owner. If a house of

brick be destroyed by accident and the walls fall, the brick may be converted into personalty by any act of the owner which evidences his intention to so sever them. As long, however, as the owner leaves them as they have fallen, some of them in the foundation walls, and some scattered over the land, they remain real property and a part of the land. In the case of *Rogers v. Gilinger*, 30 Pa. St. 185, 72 Am. Dec. 694, it appeared that a house was blown down by a storm, the lumber of which it had been composed falling upon the land. Subsequently the land was sold, and a contest arose over the ownership of this lumber. It was held that the lumber remained realty and a part of the land, and passed, with the land, to the vendee. In the opinion, Mr. Justice Strong said: "What, then, is the criterion by which we are to determine whether that which was once part of the realty has become personalty on being detached? Not capability of restoration to the former connection with the freehold, as it is contended, for the tree prostrated by the tempest is incapable of reannexation to the soil, and yet it remains realty. The true rule would rather seem to be that that which was real shall continue real until the owner of the freehold shall, by his election, give it a different character." This decision was cited, approved and followed in *Leidy v. Proctor*, 97 Pa. St. 486, the court holding that timber which had fallen, but which had not been converted into rails, etc., by the owner, passed to the purchaser as a part of the realty. The case of *Rogers v. Gilinger*, 30 Pa. St. 185, 72 Am. Dec. 694, is also cited with approval in 1 Washburn on Real Property, fifth edition, 16; 4 Sharswood & Budd's Leading Cases in Law of Real Property, 518; 1 Kerr on Real Property, 96. In the present case the record does not disclose that the vendors of the premises severed the bricks from the land or did any act evincing an intention to reconvert them into personalty. We think that the bricks remain, therefore, a part of the realty, and that the judge did not err in holding that they belonged to the purchaser.

<sup>901</sup> 2. It appears from the record that some time elapsed after the verdict of the jury before the decree was entered by the court. The plaintiffs in error contended that they ought to have interest on the principal amount from the time of the verdict, and not merely from the date of the decree, as it was the duty of the plaintiff's counsel to have the decree entered. Under our code, judgments at law bear interest only from the time they are entered and signed. This being a judg-

ment or decree in equity, for a specific sum of money, we see no reason why the same rule should not be applied. The plaintiffs in error, if they intended to abide by the verdict, had the right to move the court to enter the decree as soon as the verdict was received. They were entitled to the money found by the verdict, and if they wished it to bear interest they should have moved that the decree be entered. Inasmuch as they did not do so, and the plaintiff waited some time after the verdict before having the decree entered, it should bear interest from its date only.

3. The trial judge decreed that the defendants in the court below pay the costs of the suit. In cases in equity, it is the duty of the judge to determine which party shall pay the costs, or whether he shall divide them between the parties: Civ. Code, sec. 4850. It is a matter within his discretion. The jury having found that the plaintiff had tendered the true value of the land to the vendees and that the latter had refused it and insisted on a greater price, there was certainly no abuse of discretion in the adjudication as to costs.

Judgment affirmed.

All the justices concurring.

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**Fixtures.**—On what are fixtures, see the monographic note to *Gray v. Holdship*, 17 Am. Dec. 686-696. Consult, also, the recent cases of *Thompson v. Smith*, 111 Iowa, 718, 82 Am. St. Rep. 541, 83 N. W. 789; *Hall v. Law Guarantee etc. Co.*, 22 Wash. 305, 79 Am. St. Rep. 935, 60 Pac. 643. Fragments of a building blown down by a storm will continue to be regarded as realty: *Rogers v. Gillingier*, 30 Pa. St. 185, 72 Am. Dec. 694.

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**CASES**  
**IN THE**  
**APPELLATE COURT**  
**OF**  
**INDIANA.**

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**PRITCHETT v. AHERNS.**

[26 Ind. App. 56, 59 N. E. 42.]

**NEGOTIABLE INSTRUMENTS—ILLEGAL CONSIDERATION—RATIFICATION.**—A note given in consideration of money won from the maker by the payee on the result of a wager is a contract prohibited by statute, and is absolutely void. It cannot, therefore, be ratified without a new and valid consideration to support it.

**ESTOPPEL IN PAIS—PROHIBITED CONTRACT.**—When suit is brought upon a contract prohibited by law, the defendant may be estopped, by his admissions or by his conduct, from pleading that the contract is void, where such admissions or conduct have led the plaintiff to act to his detriment.

**ESTOPPEL IN PAIS—NOTE GIVEN FOR AN ILLEGAL CONSIDERATION.**—If a person, about to buy a note given for an illegal consideration, asks the maker if it is "all right," and he replies that it is, and does not intimate that he has any defense thereto, but requests a little delay in order that he may trade horses to the payee for the note and thus pay it more cheaply than he could with money, the maker's admissions and conduct estop him from denying the validity of the note in the hands of such person, who has purchased it for a valuable consideration.

**ESTOPPEL—FRAUD—WHAT IS.**—Conceding that there can be no estoppel without fraud, it is a fraud to deny what has been previously affirmed.

A. Rice, W. S. Potter, and C. R. Milford, for the appellant.

I. E. Schoonover, for the appellees.

**57 HENLEY, C. J.** This was an action commenced before a justice of the peace by the appellees, who were the indorsees of a certain promissory note, against appellant, who was the maker of the note in suit. The original payee of the note, who indorsed it to the appellees, was one Edwin D. Ward.

There was a trial by the court. The court found the facts specially and stated its conclusions of law thereon. The facts and the question of law arising upon the exceptions to the conclusions of law will fully appear from the special finding of facts, which was as follows: "1. That on the eighth day of January, 1898, the defendant, James A. Pritchett, executed and delivered to one Edwin D. Ward, a promissory note, reading in the words and figures following, to wit:

" '\$100.

January 8, 1898.

" 'Four months after date I promise to pay to the order of Edwin D. Ward \$100, at Attica, Indiana, value received, with interest at — per cent per annum.

" 'JAS. A. PRITCHETT.'

"2. That the sole consideration for the execution of said note was money won by said Ward from the defendant on the result of a wager. 3. That said Ward, for the consideration of eighty-eight dollars paid to him by the plaintiff, John W. Aherns, assigned and delivered said note, by indorsement thereon, in writing, to the plaintiffs, said indorsement being as follows: 'Pay C. Lewis Aherns and John W. Aherns. Edwin D. Ward.' 4. That plaintiffs at the time they purchased said note had no knowledge, notice, or information whatever that the note was given for money won on the result of a wager, or that the defendant had, or claimed to have, any defense thereto. That plaintiffs, before purchasing said note, and in contemplation that one or both of them might purchase it, went <sup>58</sup> together with said note to the defendant, and placing the same in his hands told him that the plaintiff, C. Lewis Aherns, had an account on the payee, Ward, and that he (C. Lewis Aherns) thought of trading for the note and wanted his brother, (the plaintiff), John W. Aherns, to buy the note, and that they (plaintiffs) wanted to know from him (defendant) if the note was all right; that the defendant replied that the note was all right, and, after a little hesitation, further stated that he wished plaintiffs would wait a little while; that he (defendant) thought he could trade Ward some horses for the note and this would enable him to pay it cheaper than he could with the money; that the defendant made no further statement about the note, and did not inform or intimate to plaintiffs, or either of them, that he claimed to have any defense thereto; that plaintiffs afterward, upon the faith of the defendant's statements, as aforesaid, which they believed to be true, purchased said note from said Ward, as hereinbefore found. 5. That there is due

and unpaid on said note one hundred and five dollars and sixty cents. And as conclusions of law upon the foregoing facts, the court finds that the defendant is estopped, as against plaintiffs, from urging as a defense to said note that the consideration therefor was money won on the result of a wager, and that the plaintiffs are entitled to have a judgment in this action against the defendant, on said note, for the said sum of one hundred and five dollars and sixty cents."

This court, in the recent case of *Irwin v. Marquett*, 26 Ind. App. 383, post, page 297, 59 N. E. 38, held that a contract prohibited by the statute was absolutely void, and that in a case precisely like the one at bar, except that the contract in the case cited was a check instead of a note, was absolutely void and incapable of enforcement, even in the hands of an innocent purchaser for value before maturity, and even though the contract be in form such as would make it governed by the law-merchant.

The question of whether or not the facts found in the special finding amount to an estoppel, and whether or not <sup>59</sup> appellant's acts could be such as would amount to an estoppel in a case like this, was fully decided and disposed of in the case of *Kuriger v. Joest*, 22 Ind. App. 633, 52 N. E. 674, 54 N. E. 414, where this court said: "Appellant does not contend that the facts pleaded show a ratification, but that what appellee did and said about the note estops him from now pleading non est factum. We cannot understand why one who sees and knows that his name has been forged to a note may not, by his conduct, be estopped from pleading forgery. It is settled by many well-considered cases that while a person whose name has been forged may be estopped by his admissions, upon which others may have changed their relations, from pleading the truth of the matter to their detriment, the act from which the crime springs cannot, upon considerations of public policy, be ratified without a new consideration to support it." To the same effect see *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 613, 16 N. E. 606; *Lewis v. Hodapp*, 14 Ind. App. 111, 56 Am. St. Rep. 295, 42 N. E. 649; *Shisler v. Vandike*, 92 Pa. St. 447, 37 Am. Rep. 702; 2 *Randolph on Commercial Paper*, sec. 629. These and a great many other cases establish the doctrine that such contracts as the one under consideration cannot be ratified without a new and valid consideration to support them, but they also establish the doctrine that a person, by admissions or by conduct, may be estopped from pleading that the contract is void, where



such admissions or conduct leads another to act to his detriment. It is undoubtedly true in this case that the statements and conduct of appellant, as shown by the special finding of facts, induced appellees to purchase the note and part with the consideration; and, under the cases, we must hold that appellant is estopped from making the defense that he could otherwise have made to the contract.

It is provided by statute in this state that a contract of suretyship by a married woman is absolutely void, and she cannot do anything to ratify such a contract, yet she may by her acts or admissions be estopped from asserting her <sup>60</sup> suretyship: *Ward v. Berkshire Life Ins. Co.*, 108 Ind. 301, 9 N. E. 361; *Rogers v. Union etc. Ins. Co.*, 111 Ind. 343, 60 Am. Rep. 701, 12 N. E. 495; *Kniss v. Holbrook*, 16 Ind. App. 229, 44 N. E. 563.

It is contended by counsel for appellant that there can be no estoppel without fraud. But conceding this to be the law, still it is fraud to deny what had been previously affirmed: *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *Pitcher v. Dove*, 99 Ind. 175. We find no error.

Judgment affirmed.

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**Gambling Transaction.**—A note given in settlement for money lost by the maker in a gambling game is void: *Swinney v. Edwards*, 8 Wyo. 54, 80 Am. St. Rep. 916, 55 Pac. 306. See, also, *Stanford v. Howard*, 103 Tenn. 24, 76 Am. St. Rep. 635, 52 S. W. 140.

**Contracts Cannot be Ratified**, if void by reason of being in violation of a statute, or as being opposed to public policy: See the monographic note to *Henry Christian Bldg. etc. Assn. v. Walton*, 59 Am. St. Rep. 638-644. In *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 613, 16 N. E. 606, it is said that there can be no ratification of a forged note, binding upon the person whose name is forged, in the absence of an estoppel in pais, or without a new consideration: See, further, the note to this case, 5 Am. St. Rep. 618-621; *Lewis v. Hodapp*, 14 Ind. App. 111, 56 Am. St. Rep. 295, 42 N. E. 649.

**CONSOLIDATED STONE COMPANY v. WILLIAMS.**

[26 Ind. App. 131, 57 N. E. 558.]

**MASTER AND SERVANT—INJURY TO EMPLOYEE—ACTION AGAINST MASTER—SUFFICIENCY OF COMPLAINT.** When a "derrick boss" sues his employer for injuries caused to him by the breaking of a defective rope connected with the derrick, a complaint showing that the plaintiff was injured while in the performance of his ordinary duties, and while in a place that was unsafe, solely by the defective condition of the rope, and alleging that the defendant had knowledge of the rope's defective condition, but that the plaintiff had not, is sufficient as alleging a cause of action for an injury occasioned through the defectiveness of the rope.

**MASTER AND SERVANT—ACTION AGAINST MASTER—AVERMENTS IN COMPLAINT—WHEN NOT INCONSISTENT.**—An allegation in a complaint for personal injuries received in a stone quarry, by the breaking of a defective rope attached to a derrick, that the plaintiff was a "derrick boss" in the quarry, is not inconsistent with a general averment on his part of a want of knowledge of any defect in the rope.

**MASTER AND SERVANT—ACTION AGAINST MASTER—DEFECTIVE APPLIANCES—WHAT PLAINTIFF NEED NOT PLEAD.**—In an action brought by an employé against his employer, for personal injuries caused by the breaking of a defective rope connected with a derrick, the plaintiff need not allege that he had inspected the rope, or that he had not had an opportunity to inspect it, or that he could not have learned of its defectiveness by the exercise of ordinary care and diligence.

**TRIAL—SPECIAL VERDICT—WHAT IS NOT.**—A general verdict returned by a jury, with answers to interrogatories, is not a special verdict.

**WITNESSES—OPINION AS TO STRENGTH OF ROPE—COMPETENCY.**—When an employé, a "derrick boss" in a stone quarry, sues his employer for personal injuries caused by the breaking of a defective rope connected with the derrick, while it was being lowered, a witness who states that he is familiar with the quarry business and the handling of derricks, and that he had personal knowledge of the particular rope which broke and caused the plaintiff's injury, is competent, without a showing of his skill or experience in the making of ropes, to give an opinion as to whether the particular rope in question was strong enough for the use to which it was put in lowering the particular derrick.

**TRIAL—VARIANCE—WHEN NOT MATERIAL.**—A variance between the complaint and the evidence is not material where it does not mislead in the preparation of a defense.

H. C. Duncan and I. C. Batman, for the appellant.

J. R. East and McHenry Owen, for the appellee.

**132 BLACK, J.** The appellee's complaint, consisting of a single paragraph, was held sufficient on demurrer. It showed that the appellant, a corporation, was engaged in the business

of quarrying and shipping stone in Lawrence county; that in the management of its business it employed a great number of hands, derricks, ropes, and machinery; that the appellee was its employé as derrick boss, receiving a sum stated per day for his services; that it was his duty while in the employment of the appellant to obey the orders, directions, and commands of one Albert Stone, who was the appellant's general superintendent, and had full charge of the appliances, machinery, hands, and business in detail; that it was the appellee's duty to give signals while operating the derrick, as directed by said superintendent; that on the 22d of May, 1897, the appellant ordered and directed that the derrick should be let down and the mast pole, some sixty feet high, gradually lowered to the ground southward by means of ropes, two guy-ropes and one slack rope; that <sup>133</sup> said guy-ropes were fastened to the top of said mast pole, and the other ends of these ropes were fastened to trees or other derricks and stones, east and west, at the bottom of said mast pole at such distances as to pull against each other at the top of the mast, while a third rope was fastened to the top of the mast pole and the other end fastened to pulleys, called a block and tackle, at the bottom, in such manner that in lowering the mast said third rope would unwind gradually and slowly lower the top end of said mast to the ground; that in lowering it, to do the work safely, it required that all of said ropes be of wire or heavy hemp and of sufficient strength to hold the mast during its entire descent to the ground, and that "each" should be slackened together; but the rope known as the slack rope, on the north, was old, defective, and partially decayed and unfitted to lower said derrick; that it was made of grass or hemp, was too small in size, being but one inch in diameter, and too weak to bear up the weight of said mast pole; all of which facts as to its defective condition and unfitness for the purpose for which it was being used were well known to the appellant at and prior to the appellee's injuries hereinafter mentioned, but were entirely unknown to the appellee; that just prior to the lowering of said derrick, the appellant, through its superintendent, ordered and directed the appellee to go to a point south of the mast, near the place where its top would be when it reached the ground, but out of reach of said mast, and there to remain until the mast was lowered, and then to adjust it on some pieces of timber; that appellee obeyed said order and went to said point, which was apparently safe to him, and he would have escaped any injury had said rope not been so de-



fective and dangerous; but by reason of its being defective and liable to break and allow the mast suddenly to wrench eastward, the place where he was ordered to work was dangerous and unsafe to work about, "which dangers and dangerous place were well known to" the appellant, but wholly unknown to the appellee <sup>134</sup> at and before his injuries; that while in the line of his duty under his employment and while obeying the order of the appellant, and while using all care and caution, and without fault on his part whatever, while watching the descent of said mast and surroundings of the place, the said north slack rope by reason of being defective, dangerous, and unsafe suddenly broke and allowed said mast pole suddenly to wrench to the east and with great force jerk the west guy-rope, which at the time was some thirty feet away from the appellee, against his right side and arm so suddenly that he had no time to escape from it. The injury thus inflicted was described, and it was alleged that all said injuries were caused solely by the negligence and carelessness of the appellant in the use of said slack rope when it was defective and dangerous as herein set forth, and in the ordering of the appellee to the place of his injury, well knowing that said slack rope was liable to break and injure the appellee at that place; and that all said injuries were so received without any fault, carelessness, or negligence on the part of the appellee, etc.

Whatever may have been the intention of the pleader, the complaint cannot be regarded as charging the appellant with negligence in removing the appellee from a safe place in which he had been employed to work to perform work temporarily outside of the scope of his employment in an unsafe place. It is expressly shown that he was in the line of his employment when injured. It is shown that the place was dangerous, but it was so only by reason of the defectiveness of the guy-rope. The averments relating to the place and the order to work there, and the appellant's knowledge, and the appellee's ignorance as to its being a dangerous place, can be regarded only as aiding in showing that the appellee was working in the line of his duty, and that the appellant had knowledge, while the appellee was ignorant of the liability of the appellee to injury through the defectiveness of the guy-rope while he was so engaged within <sup>135</sup> the scope of his employment. It was alleged that the place was apparently safe to the appellee, and that he would have escaped injury if the rope had not been defective. The danger or safety of the appropriate

place for his proper work was dependent only on the quality of the guy-rope. It was the appellant's knowledge of the defectiveness of the rope alone that gave it notice of the liability of a person working there to be injured. The only wrong sufficiently alleged was the negligence in using the insufficient guy-rope with knowledge of its insufficiency, and of the consequent danger, whereby the appellee, working within the scope of his employment, in ignorance of such defectiveness and danger, was injured.

The suggestion of counsel that the facts particularly alleged were necessarily inconsistent with the general averment of want of knowledge on the part of the appellee is not a just criticism. It was not impossible, under the circumstances shown by the complaint, as a matter of fact, for the appellee to be ignorant of the insufficiency of the guy-rope. It was not necessary for him to show in his pleading that he had inspected the rope, or that he had not had opportunity to inspect it, or that he could not have learned of its defectiveness by the exercise of ordinary care and diligence: *Evansville etc. R. R. Co. v. Duel*, 134 Ind. 156, 33 N. E. 355; *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 53 N. E. 235. The complaint was sufficient to put the appellant to its answer.

The appellant having answered by a denial, the cause was tried by jury, and a general verdict in favor of the appellee was returned with answers of the jury to interrogatories. Counsel have devoted some portion of the argument to an assignment of error in overruling the appellant's motion for judgment on the special verdict. This assignment cannot be regarded as properly presenting any question for decision, inasmuch as the record does not contain a special verdict or show that a special verdict was rendered.

Charles Quackenbush, a witness for the appellee, had 136 testified, amongst other matters, that he had been engaged in the quarry business about twenty years; that at the time of the injury in question he was assistant superintendent of the appellant at the quarry where the injury occurred; that he remembered the slack rope which broke and had known it about two years, maybe longer; that it was seven-eighths of an inch or one inch in diameter; that it was between two hundred and two hundred and fifty feet long; that it had been in use there in the quarry for two years, and he thought longer; that it was worn some, more in some places than in others; that he had lowered several derricks, had handled a good many derricks,

and had had sufficient experience to know the usual and best methods of lifting and lowering derricks. The witness was permitted, over the appellant's objection, to answer the following question: "Now, from what you have said as to the size of this rope, and said as to its being old and worn, more in some places than in others, I will ask you to state to the jury whether that rope was sufficient to lower the mast pole of that derrick, basing your answer on what you have said on the witness-stand, and from your long experience in handling derricks." The witness answered that the rope was not in shape to let that derrick down, was not sufficient in strength.

It was not necessary, we think, for the witness to be shown to have skill or experience in the making of ropes, to authorize the acceptance of his opinion as to the sufficiency in strength of the particular rope for the use to which it was put in lowering the particular derrick, the witness basing his opinion upon the facts first stated by him, including his own experience. After the best description that could have been given by witnesses of the rope and the derrick, the conclusion of the jury would be in some measure based upon conjecture, and the honest opinion of a man so qualified would conduce to greater certainty: See *Porter v. Pequonnoc Mfg. Co.*, 17 Conn. 249; *Hardy v. Merrill*, 56 N. H. 227, 241, 22 Am. Rep. 441; *Bennett v. Meehan*, 83 Ind. 137 566, 43 Am. Rep. 78; *Louisville etc. R. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

A number of other supposed errors in the admission and the exclusion of testimony are argued by counsel. The matters so presented have been carefully examined by us without finding any ground for reversal, and the questions involved are not of such importance as to require further notice here.

There is also some brief discussion of the instructions. There is some want of agreement between the record and the reference thereto in the appellant's brief, and the appellant has failed to comply with the requirements of our rules relating to the discussion of instructions. In the introduction of the evidence a number of models of derricks were used, and the references thereto in the examination of the witnesses and in their answers to the questions of the attorneys are in many instances unintelligible as they appear in the record.

We have bestowed much time upon the voluminous bill of exceptions containing the evidence in our effort to determine the question extensively argued by counsel as to whether or not the case made by the evidence was substantially different from



the cause of action set forth in the complaint. The mode of lowering the mast as shown by the evidence was not accurately described in the pleading. A wire rope, called in evidence the main fall, which was fastened to the mast near the top thereof, extended northward, and, passing over a drum, was operated by steam power, and the slackening of this rope by this method permitted the mast to descend southward. This rope did not break. The rope, by the breaking of which the injury was caused, was a slack rope made of hemp or grass used in connection with block and tackle, as alleged in the complaint, for gradually slackening the guy, a wire rope which extended westward, instead of northward, as stated in the complaint. The guy which extended eastward was fastened without means of slackening. <sup>138</sup> The idle guy, which struck the appellee, was a wire rope which extended from the top of the mast toward the southwest to a point where it was fastened, so that by the descent of the mast it became slackened and fell to the east with the mast. The rope which broke and the use which was made of it were described in the complaint as they were proved on the trial, except as above indicated. There was a variance, but it does not seem to have been one of such character that the appellant could be regarded as having been misled in the preparation of its defense. We cannot conclude that there was a failure to prove the substantial averments of the complaint.

Judgment affirmed.

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**Witness.**—An opinion may be given by a nonexpert as to matters with which he is specially acquainted, but which cannot be specially described: *Bennett v. Meehan*, 83 Ind. 566, 43 Am. Rep. 78. On opinion evidence as to the condition of a tool in using which a servant is injured, see *Johnson v. Missouri Pac. Ry. Co.*, 96 Mo. 340, 9 Am. St. Rep. 351, 9 S. W. 790; *Kent v. Yazoo etc. R. R. Co.*, 77 Miss. 494, 78 Am. St. Rep. 534, 27 South. 620.

**Master and Servant—Safe Appliances.**—On the duty and liability of a master to his servant respecting safe appliances with which to work, see the monographic notes to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 218-225; *Chicago etc. R. R. Co. v. Swett*, 92 Am. Dec. 213-221. Consult, also, the recent cases of *Bibich v. Lake Superior Smelting Co.*, 123 Mich. 401, 81 Am. St. Rep. 215, 82 N. W. 279; *Purdy v. Westinghouse etc. Mfg. Co.*, 197 Pa. St. 257, 80 Am. St. Rep. 816, 47 Atl. 237. The fact that a servant has as good an opportunity as his master to know of defects involving risks does not necessarily charge him with contributory negligence. He has a right to rely on his master's inquiry, because it is the latter's duty to inquire, and he may assume that proper inquiry has been made by the master: *Starr v. Kreuzberger*, 129 Cal. 123, 79 Am. St. Rep. 92, 61 Pac. 641.

## EVERMAN v. HYMAN.

[26 Ind. App. 165, 28 N. E. 1022.]

**REWARDS—ACTION FOR—KNOWLEDGE OF OFFER NOT ESSENTIAL.**—When a reward is offered for the return of stolen property, the one who returns it can sustain an action for the reward, without alleging in the complaint that his services were rendered with a knowledge of the reward offered, and in consideration of the offer.

**APPEAL—BILL OF EXCEPTIONS—FORM OF, NOT MATERIAL.**—A bill of exceptions is not required to be in any particular form, and is not invalid because it lacks the usual formal beginning.

**APPEAL—BILL OF EXCEPTIONS—DATE OF PRESENTATION.**—A failure to state, in a bill of exceptions, the date of its presentation for the judge's signature is not material where the bill is shown to have been signed and filed within the time allowed by the court.

**APPEAL—BILL OF EXCEPTIONS—INDORSEMENT.**—It is not necessary to the filing of a paper that it should be indorsed as having been so filed. It is filed when it is delivered to the proper officer, and by him received to be kept on file. Hence, the absence of a file-mark on a bill of exceptions is not material where the clerk's certificate shows that the bill was filed.

**APPEAL—BILL OF EXCEPTIONS.—A JUDGE'S CERTIFICATE** that a bill of exceptions contains all the evidence given in the cause is sufficient, though it follows the reporter's certificate that "this was all the evidence given in the cause."

**REWARDS—"CAPTURE" OF THIEF—GIVING INFORMATION IS NOT.**—One is not entitled to a reward for the "capture" of a thief simply because he has informed an officer where the thief can be found, although the officer goes at once and makes an arrest. A reward offered for a "capture" is not a reward offered for information.

**REWARDS—PUTTING OWNER INTO POSSESSION BEFORE ACTION.**—One who sues to recover an unpaid reward for the "return" of a stolen horse is not obliged, before bringing suit, to put the owner in possession of the animal. Hence, there is no error, in such an action, for the court to refuse to submit to the jury an interrogatory as to whether the plaintiff did do so.

L. D. Boyd, for the appellant.

W. C. Smith, G. W. Julien, C. R. Pollard, and R. C. Pollard, for the appellee.

<sup>100</sup> **NEW, C. J.** This was an action by the appellee against the appellant for the recovery of a reward offered by the latter.

The complaint is in three paragraphs: 1. That a horse was stolen from the appellant, for the return of which he offered by handbill a reward of one hundred dollars; that thereupon the appellee rescued said horse from the thief and returned

the same to the appellant, who refuses, upon the appellant's demand, to pay said reward. 2. That a horse was stolen from the appellant, who offered, by handbill, for the capture of the thief one hundred dollars; that thereupon the appellee captured said thief, and placed him in the custody of the sheriff of the county where said horse was stolen; that the appellant has refused upon the demand of the appellee to pay said reward. 3. The third paragraph of the complaint is a combination of the first and second paragraphs, and asks judgment for two hundred dollars.

With each paragraph of the complaint is filed a copy of the offered reward, as follows: "Stolen—From the stable of the undersigned on Sunday morning, July 28th, a large dapple gray horse, high carriage, bridle scalds about the head, scar on hind foot made by rope halter, flat feet, no shoes. \$100 reward for the return of the horse and \$100 reward for the capture of the thief. William Everman, Burlington, Indiana."

Demurrers to the first and second paragraphs of the complaint were overruled and exceptions saved. The third paragraph of the complaint was not demurred to. The appellant answered by a denial. There was a general verdict for the appellee, together with answers to interrogatories submitted by the court to the jury at the request of the appellant.

<sup>167</sup> The first alleged error of the court below is predicated upon the overruling of the demurrers to the first and second paragraphs of the complaint. It is also assigned as error that the court erred in overruling a demurrer to the third paragraph of the complaint. The record, however, does not disclose a demurrer to the third paragraph.

The only objection urged by the appellant to the first and second paragraphs of the complaint is, that there is a failure to allege that the services rendered by the appellee were with a knowledge of the reward offered by the appellant, and in consideration of said offer being made.

In *Dawkins v. Sappington*, 26 Ind. 199, it was held that a person performing the services for which a reward was offered was entitled to the reward, although he did not know, at the time of the performance, that the reward had been offered, and therefore could not have been influenced or induced to act from the offer. The same case is cited as authority in *Board etc. v. Wood*, 39 Ind. 345. See, also, *Auditor v. Ballard*, 9 Bush, 572, 15 Am. Rep. 728, where *Dawkins v. Sappington*, 26 Ind. 199, is quoted from with approval.



In *Harson v. Pike*, 16 Ind. 140, it was decided that it was not necessary that notice should be given to the party offering the reward that his proposal was being acted upon. It is there said that no authority is known for requiring such notice, nor is its effective purpose perceivable. The same question is decided the same way in *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1, the court saying that notice of the acceptance of the offer was not one of the conditions on which the offered reward was to be paid: See notes to this case as published in 26 Am. Rep. 1. See, also, *Reif v. Paige*, 55 Wis. 496, 42 Am. Rep. 731, 13 N. W. 473.

In *Wentworth v. Day*, 3 Met. 352, 37 Am. Dec. 145, it was said: "If the loser of property, in order to stimulate the vigilance and industry of others to find and restore it, will make an express promise of a reward, either to a particular person, or in general terms to anyone who will return it to him, and, <sup>168</sup> in consequence of such offer, one does return it to him, it is a valid contract. Until something is done in pursuance of it, it is a mere offer, and may be revoked. But if, before it is retracted, one so far complies with it as to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation."

In *Russell v. Stewart*, 44 Vt. 170, it is shown that five hundred dollars was offered for the arrest of a murderer. Stewart made the arrest, and it was held that he was entitled to the reward, although he had no knowledge of the offer of a reward when he made the arrest.

In *Eagle v. Smith*, 4 Houst. 293, the action being for a reward offered for a return of lost goods, it was held that the party who had performed the prescribed condition, by finding and returning the goods to the owner, was entitled to recover, although he did not know at the time he returned them that any reward had been offered.

In *Williams v. Carwardine*, 4 Barn. & Adol. 621, it was held that although the information which was given by the plaintiff, and which led to the discovery and conviction of the murderer, was given from other motives than the reward offered, it was the opinion of all the judges that the informer was entitled to recover the reward. Denman, C. J., said: "The plaintiff, by having given information, which led to the conviction of the murderer of Walter Carwardine, has brought himself within the terms of the advertisement, and therefore is entitled to

recover." Littledale, J., said: "The advertisement amounts to a general promise to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information." Parke, J., said: "There was a contract with any person who performed the condition mentioned in the advertisement." Patterson, J., said: "I am of the same opinion. We cannot go into the plaintiff's motives."

<sup>169</sup> In *Vigo Agricultural Soc. v. Brumfiel*, 102 Ind. 146, 52 Am. Rep. 657, 1 N. E. 382, it is stated, as an elementary principle, that where a party publishes an offer to the world, and before it is withdrawn another acts upon it, the party making the offer is bound to perform his promise. In the same case, the essential difference between a contract by advertisement and an ordinary agreement is stated thus: "In the former case there is no complete contract until performance, while in the latter there is a contract as soon as there is an acceptance of the proposal."

It will thus be seen that the liability to pay a reward offered may be placed upon a principle or doctrine somewhat different from that which governs in ordinary contracts. The demurrers to the first and second paragraphs of the complaint were properly overruled.

The remaining specification of error made by the appellant is the overruling of his motion for a new trial. The first reason named in the motion for a new trial is that the verdict of the jury is not sustained by sufficient evidence. Counsel for the appellee affirm that the evidence is not in the record, and therefore this court cannot say that the verdict is not sustained by sufficient evidence. Their contention, as stated by themselves, is, "that the longhand manuscript of the evidence in this case as made by the reporter was never filed in the office of the clerk as required by law, and was not properly incorporated in a proper bill of exceptions and cannot be considered by this court." They contend that the said longhand manuscript cannot be regarded as being in a proper bill of exceptions because the bill does not begin with the usual formula or heading, and because the date of its presentation to the judge is not stated in the bill.

Immediately preceding said bill of exceptions in the transcript is the following entry by the clerk: "And also on the twenty-third day of December, 1889, the defendant files general bill of exceptions, saving the evidence, and numbered <sup>170</sup>

2, which reads in the words and figures following, to wit." Then follows the longhand manuscript of the evidence as taken down by the official reporter of the court, there being no caption, nor preliminary statement of any kind to indicate that said longhand manuscript of the evidence was the evidence given in the cause, except the number of the case, the entitling of the cause in the manner usual in civil actions, names of counsel and for whom they appeared, followed by the names of the witness and the page of the transcript on which the testimony of each witness began. Following the evidence in immediate connection occur the following words: "Defendant here rested his case and this was all the evidence given in the cause." Next comes the certificate of the official reporter, and then these words: "And the defendant now tenders this his bill of exceptions and asks that the same be signed, sealed, and made a part of the record in this cause, which is done this twenty-third day of December, 1889." At the close of the words thus quoted is the signature of the judge, and immediately following his signature the following: "Filed December 23, 1889. Charles Pigman, Clerk." Then follows the certificate of the clerk under his hand and the seal of the court, which we have thought best to give in full:

"State of Indiana, }  
 "Carroll county. } ss.

"I, Charles Pigman, clerk of the Carroll circuit court of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy of all papers filed, entries made on the order-books of said court, proceedings had and judgment rendered in the above-entitled cause in said court on file and of record in my office; and also that the longhand manuscript of the evidence embodied in the general bill of exceptions saving the evidence, and numbered 2, as the same appears in the above transcript, is the original longhand manuscript made by the official shorthand reporter of said court from her verbatim report of the evidence given in said cause, and is the identical one filed in my office on the twenty-third day of December, 1889. In witness <sup>171</sup> whereof I have hereunto set my hand and affixed the seal of said court at my office in Delphi, Indiana, this twenty-fourth day of December, A. D. 1889.

"[Seal]

CHARLES PIGMAN, Clerk."

While it is a matter of some surprise that attorneys in the preparation of bills of exceptions should omit to observe ap-



proved forms, the statute does not require that a bill of exceptions shall be in any particular form. A bill of exceptions, as defined in 1 Burrill's Law Dictionary, page 205, is: "A formal statement in writing of the exceptions taken to the opinion, decision, or direction of the judge, delivered during the trial of a cause, setting forth the proceedings on the trial, the opinion or decision given, and the exception taken thereto, and sealed by the judge in testimony of its correctness."

The case of *Dennis v. State*, 103 Ind. 142, 2 N. E. 349, was one where the usual formula or beginning in the bill of exceptions was omitted, and where the prefatory matter was almost identical with that in the case at bar. The bill of exceptions in that case was held to be sufficient: See, also, Rev. Stats. 1881, sec. 658.

Is the date of the presentation to the judge of the bill of exceptions sufficiently shown therein? There is to the bill the usual authentication and signature of the judge, and it therefrom appears that it was signed on the 23d of December, 1889, which was within the time limited. We think that this sufficiently shows a compliance with the statute requiring that the date of the presentation of the bill shall be stated therein. When the date of the presentation is nowhere stated in the body of the bill as a distinct and separate fact, and the bill is signed not later than the time allowed, and it so appears from the bill itself, we can see no reason why the date of the signing by the judge should not be regarded as the date of presentation to him for his signature. The time given for the filing of the bill was ninety days from the 1st of November, 1889, and it is properly shown by the record that it was signed and filed December <sup>172</sup> 23, 1889: *Hale v. Matthews*, 118 Ind. 527, 21 N. E. 43; *Guirl v. Gillett*, 124 Ind. 501, 24 N. E. 1036; *Orton v. Tilden*, 110 Ind. 131, 10 N. E. 936; *Plymouth v. Fields*, 125 Ind. 323, 25 N. E. 346; *Buckner v. Spaulding*, 127 Ind. 229, 26 N. E. 792.

The point is also made that it is not shown by the record that the reporter's longhand manuscript of the evidence was filed with the clerk of the circuit court as required by section 1040 of the Revised Statutes of 1881. In other words, that no filing of the original longhand manuscript of the evidence is shown, except as it was filed as incorporated in the bill of exceptions. We have seen that the bill of exceptions was filed in time. If the original longhand manuscript of the evidence was incorporated in the bill of exceptions, it thereby became a part

of the bill, and was therefore filed when the bill was filed. It is not necessary to the filing of a paper that it should be indorsed as having been so filed. A paper is filed when it is delivered to the proper officer, and by him received to be kept on file. It is shown by the clerk's certificate that the original longhand manuscript of the evidence is embodied in the bill of exceptions, and we are inclined to think that the proper inference from the clerk's certificate, in relation thereto, is, that said longhand manuscript was filed with him, not only as a part of the bill of exceptions, but independent of it as well, for in the certificate is the statement that said original longhand manuscript of the evidence "is the identical one filed in my office on the twenty-third day of December, 1889": See *Hull v. Louth*, 109 Ind. 315, 58 Am. Rep. 405, 10 N. E. 270; *Dennis v. State*, 103 Ind. 142, 2 N. E. 349; *Stout v. State*, 90 Ind. 1; *Hessian v. State*, 116 Ind. 58, 17 N. E. 614.

As we understand counsel for the appellee, they also claim that it is not properly declared or certified by the judge that the bill of exceptions contains all the evidence given in the cause.

At the close of the evidence, as we have hereinbefore stated, occur the words: "Defendant here rested his case and this was all the evidence given in the cause." Then <sup>173</sup> follows the certificate of the official shorthand reporter, and next and last the authentication and signature of the judge.

We do not think that the interposition of the reporter's certificate invalidates the bill of exceptions. When the judge signed it, he thereby adopted and certified every material statement in the bill which preceded his signature: *McCormick etc. Co. v. Gray*, 114 Ind. 340, 16 N. E. 786.

Recurring now to the first reason assigned for a new trial, to wit, that the verdict of the jury is not sustained by sufficient evidence, we think there was evidence from which the jury might find that the appellee was entitled, and the only one entitled, to the one hundred dollars offered by the appellant for the return of the horse; beyond that sum, however, we think the finding was excessive. The excess above one hundred dollars must have been by the jury allowed to the appellee because of his having located the thief and informed the deputy sheriff where he could be found. There is no other evidence in the record from which the jury could have regarded the appellee as having a claim upon the reward offered for the capture of the thief.

The arrest of the thief was made by the deputy sheriff in his capacity as such. The duty of making the arrest fell upon this officer, and he discharged it, as he was bound to do. It is true, he received information from the appellee as to where the culprit could be found, but that information he was entitled to gather and have from any and all sources possible. The reward was not offered for information as to the whereabouts of the prisoner, but for his capture. The case of County of Juniata v. McDonald, 122 Pa. St. 115, 15 Atl. 696, is precisely in point. The facts are almost identical. Following that case, which upon principle appears to us to be rightly decided, we must hold that the damages assessed were excessive in the sum of fifty dollars.

Objections were made by the appellant to the introduction of certain testimony. We have examined the evidence with care, and do not find that any available error was <sup>174</sup> committed by the court in that regard. Much of the testimony objected to was upon the theory that there could be no recovery upon the complaint unless the services rendered by the appellee were with a knowledge of the reward offered. It follows from what we have already said that objections to testimony upon that ground could not avail the appellant.

It is assigned as a ground for a new trial that the court erred in refusing to submit to the jury, at the request of the appellant, the following interrogatory: "Did the plaintiff put the defendant in possession of the horse described in his complaint before the beginning of this action?"

There was no error committed by the court in refusing to submit to the jury this interrogatory. The reward offered was for the return of the horse, not that the appellant be put in possession of the same. The interrogatory sought to be propounded to the jury was not, in our opinion, fairly within the issues. It called for a fact or act over and beyond what was required of the appellee to entitle him to the reward offered for the return of the horse. If the appellee found and offered to restore the horse to the appellant he was entitled to one hundred dollars. It might be that the horse was not put by the appellee into the possession of the appellant, and yet the former be entitled to the reward offered for the return of the horse. If the horse was found and returned to the appellant by the appellee, he would not be bound to put the appellant in actual or literal possession of the horse, if the appellant was at the time withholding the reward which was promised and due.



Inasmuch as we have reached the conclusion that on the whole case, as presented by the record, the cause has been fully and fairly tried, and a right conclusion reached in the verdict and judgment in favor of the appellee, except as to the sum of fifty dollars, it is not necessary that we give attention to instructions given or refused.

<sup>175</sup> If the appellee will, within sixty days from this date, file with the clerk of this court his remittitur of fifty dollars of the verdict and judgment as of the date of the judgment below, the judgment will be affirmed; otherwise it will be reversed, and, in either event, at the appellee's costs in this court.

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**Reward—Notice of Offer.**—As to whether it is necessary to the recovery of a reward that the claimant should have had knowledge of its offer, the authorities are conflicting: See *Stamper v. Temple*, 6 *Trumph.* 113, 44 *Am. Dec.* 296; *Fitch v. Snedaker*, 38 *N. Y.* 248, 97 *Am. Dec.* 791; *Howland v. Lounds*, 51 *N. Y.* 604, 10 *Am. Rep.* 654; notes to *Ryer v. Stockwell*, 73 *Am. Dec.* 639; *Hayden v. Souger*, 26 *Am. Rep.* 6, 7.

**Reward.**—A substantial compliance with the terms of an offer for a reward is generally held sufficient to entitle the claimant to a recovery of the reward: Note to *Ryder v. Stockwell*, 73 *Am. Dec.* 639. As to what amounts to such compliance, see *Besse v. Dyer*, 9 *Allen*, 151, 85 *Am. Dec.* 747; note to *Hayden v. Souger*, 26 *Am. Rep.* 6-9.

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## KNOUFF v. LOGANSFORT.

[26 *Ind. App.* 202, 59 *N. E.* 347.]

**HIGHWAYS—BICYCLES—USE OF SIDEWALK.**—A bicycle is a vehicle, and has no lawful right to the use of a sidewalk.

**NEGLIGENCE—CONCURRING CAUSES OF INJURY—LIABILITY.**—The fact that some other cause operated with the negligence of a defendant in producing an injury does not relieve him from liability, where such other cause would not have produced the injury but for the defendant's negligence.

**NEGLIGENCE—INJURY AT BRIDGE IN CITY FROM JUMPING TO AVOID A BICYCLE—WANT OF GUARDS—PROXIMATE CAUSE.**—It is the duty of a city to maintain guards at the abutment of a bridge connecting with a street, where there is an embankment rendering the place unsafe without guards, and its failure to do so is negligence. Hence, if a pedestrian on a sidewalk near the entrance to the bridge is suddenly confronted with a bicycle, coming at great speed, and jumps to one side to avoid a collision, but falls down the embankment and is injured, the failure to maintain guards at the place is a proximate cause of the injury, for which the city is answerable, although a concurring cause of the injury was the unlawful act of the bicyclist in riding on a sidewalk of the bridge.

C. E. Hale, G. A. Gamble, J. C. Nelson, and Q. A. Myers, for the appellant.

F. M. Kistler, S. T. McConnell, and A. G. Jenkins, for the appellee.

<sup>202</sup> ROBINSON, J. Third street, in the city of Logansport, terminates at Eel river, and connects with the south entrance of a bridge having a walk on each side; the stone abutment supporting the bridge is ten to fourteen feet high from the bed of the river to the surface of the street, and extends twelve feet east of the east line of the bridge; the street connected with the bridge at an angle of about forty-five degrees, and the west side of the paved portion of the street at its northern terminus extended eastward five or six feet beyond the east line of the bridge, ending abruptly on the south bank of the river and abutment, which left an open and exposed space in the street from five to six feet wide, that did not lead directly into the entrance of the bridge, but led to the east thereof and directly across the abutment into the river; that the city had for a long time known of this condition but had provided no guard-rail or warning. The complaint states a cause of action unless the following averment makes it defective: "That on the fourth day of July, 1899, while this plaintiff was walking along said street and <sup>203</sup> on that part used by persons on the east side thereof, going north for the purpose of crossing the river on the east sidewalk of said bridge, and just as he was about to enter the bridge, he suddenly and unexpectedly was confronted with a person riding a bicycle on the east sidewalk of the bridge, coming directly toward him at great speed from the north, and the plaintiff, for the purpose of avoiding a collision and injury, jumped suddenly to his right, and because of the failure of the city to maintain guards at that part of the street where it ends at the abutment, he fell suddenly off of the end of the street at the place herein described," producing injuries described. The complaint does not show contributory negligence, and we set out so much only of the pleading as presents the real question in controversy.

A bicycle is a vehicle, and has no lawful right to the use of the sidewalk: *Mercer v. Corbin*, 117 Ind. 450, 10 Am. St. Rep. 76, 20 N. E. 132; *Holland v. Barch*, 120 Ind. 46, 16 Am. St. Rep. 307, 22 N. E. 83; *Burns' Rev. Stats.* 1894, sec. 4398; *Indianapolis v. Higgins*, 141 Ind. 1, 40 N. E. 671.

It is argued that the bicycle rider, while engaged in an unlawful act, set in motion or created a condition that ultimately resulted in appellant's injury, and that the rational conclusion is that the bicycle rider was the proximate cause of the injury. Counsel for appellee cite the cases of *New York etc. R. R. Co. v. Perrigney*, 138 Ind. 414, 34 N. E. 233, and *Alexander v. New Castle*, 115 Ind. 51, 17 N. E. 200, as decisive.

In the briefs for appellant and for appellee is quoted the following from *Cohen v. Virginia*, 6 Wheat. 264: "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated <sup>204</sup> with care, and considered in its full extent. Other principles, which may seem to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In *New York etc. R. R. Co. v. Perrigney*, 138 Ind. 414, 34 N. E. 233, the opinion rests upon the proposition that the engineer was furnished with two sufficient hand lamps as a substitute for the regular headlight, and that it was his duty to light the headlight whether it was the regulation light or the substitute lamps; this he failed to do, and it was held that the proximate cause of the injury was the engineer's negligence in failing to light the hand lamps. It clearly appeared from the findings that the company had done its duty by furnishing proper lamps, and that the engineer failed in his duty to light them, thus clearly showing that the proximate cause of the injury was the negligence of a coemployé. "In the present case," said the court, "the defect in the lamp of the headlight was a condition; the cause of the collision was the absence of light. The absence of that light was not the defect, but was the failure of Ferris to light the hand lamps and place them in the headlight from which the presence of his engine could have been seen for the distance of five miles, and the collision averted": See *Lake Shore etc. R. R. Co. v. Wilson*, 11 Ind. App. 488, 38 N. E. 343.

In *Alexander v. New Castle*, 115 Ind. 51, 17 N. E. 200, an officer was conducting a prisoner to jail, and as they passed an excavation in the side of the street the prisoner seized the officer



"and threw him into the pit or excavation, whereby he was injured." The town was held not liable, for the very good reason that the prisoner "was clearly an intervening, as well as an independent, human agency in the infliction of the injuries of which the plaintiff complained." We fail to see how this case can be controlling in the case at bar. Could the definitions laid down by some text-writers be given a universal application, cases of this character would not be difficult of solution. But as is well said in the <sup>205</sup> Perriguy case: "Cases may illustrate, but definitions are not sufficiently explicit for practical application."

The fact that some other cause operates with the negligence of a defendant does not relieve him from liability. The question is whether the defendant's negligence was a proximate cause of the injury. And it need not necessarily have been the immediate cause. In the case at bar it was the duty of appellee properly to guard the place in question, and its failure to do so was negligence. This negligence contributed to the injury, and it cannot be said to be a remote cause for the reason that whatever it did contribute it contributed at the time and place of the injury. Another event concurred to produce appellant's injury, but this event could not have produced the injury but for appellee's negligence. Appellee's negligent breach of duty was a cause of the injury, and although there was an intervening event, yet this intervening event and the defect in the street were concurrent causes of the injury, and were both present and active in the result. Clearly, there were two causes combining to produce the result and the city was responsible for only one of these causes, yet it cannot escape liability because it was not responsible for the other: *Board etc. v. Mutchler*, 137 Ind. 140, 36 N. E. 534. The statement that an independent intervening event arrests causation must be held to mean that the original negligence was not present at the time and place of the injury, and did not contribute to the injury. Because, if there was contribution at the time and place, there is liability. If the city by its negligence put in motion a cause which continued to the end and without which the injury would not have occurred, although a third person may have contributed to the final result, yet the city's negligence must be held to be a proximate cause of the injury. The complaint shows that appellee was at fault as to the unguarded abutment, and that this was one cause of the injury; this being true, appellee cannot escape responsibility, because the act of the bicycle rider aided in bringing about the accident: See *Fowler v. Linquist*,

138 <sup>206</sup> Ind. 566, 37 N. E. 133; *Mt. Vernon v. Hoehn*, 22 Ind. App. 282, 53 N. E. 654; *Crawfordsville v. Smith*, 79 Ind. 308, 41 Am. Rep. 612, and cases there cited; *Billman v. Indianapolis etc. R. R. Co.*, 76 Ind. 166, 40 Am. Rep. 230; *Burrell Tp. v. Uncapher*, 117 Pa. St. 353, 2 Am. St. Rep. 664, 11 Atl. 619; *Knightstown v. Musgrove*, 116 Ind. 121, 9 Am. St. Rep. 827, 18 N. E. 452; *Brookville etc. Co. v. Pumphrey*, 59 Ind. 78, 26 Am. Rep. 76; *Grimes v. Louisville etc. Ry. Co.*, 3 Ind. App. 573, 30 N. E. 200; *Board etc. v. Sisson*, 2 Ind. App. 311, 28 N. E. 374.

It is true the city in the construction and maintenance of the street and unguarded abutment was not required to provide against extraordinary conditions. Nor could it be held to anticipate that a bicycle rider would violate the law by riding on the sidewalk. But this is not the question that is decisive. The city was charged with the duty of keeping its streets in an ordinarily safe condition for travel. The pleading shows that appellant was exercising a legal right in an ordinarily prudent manner, and the question is, could it reasonably be expected that the injury might happen to such a person. Upon this question the court in *Ohio etc. Ry. Co. v. Trowbridge*, 126 Ind. 391, 26 N. E. 64, said: "The principle underlying this doctrine is that there must be some connection between the effect and the cause—between the injury and the wrong. It is not necessary, however, that there should be a direct connection between the wrong and the injury; it is enough if it appears that but for the wrong no injury would have occurred; and that the injury was one which might have been anticipated: *Louisville etc. Ry. Co. v. Nitsche*, 126 Ind. 229, 22 Am. St. Rep. 582, 26 N. E. 51; *Milwaukee etc. R. R. Co. v. Kellogg*, 94 U. S. 469. It is, indeed, not necessary that the precise injury which, in fact, did occur should have been foreseen; it is sufficient if it was to be reasonably expected that injury might occur to some person engaged in exercising a legal right in an ordinarily careful manner."

The demurrer to the complaint should have been overruled. Judgment reversed.

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**A Bicycle is a Vehicle**, and a person has no right to ride one on a sidewalk: Note to *Holland v. Barch*, 16 Am. St. Rep. 314. See, further, *Richardson v. Danvers*, 176 Mass. 413, 79 Am. St. Rep. 320, 57 N. E. 688.

**Concurrent Negligence.**—If one suffers injury from the joint negligence of two parties, both are liable jointly and severally: *Pugh v. Chesapeake etc. Ry. Co.*, 101 Ky. 77, 72 Am. St. Rep. 392, 39 S.

W. 695. In *Batram v. Sharon*, 71 Conn. 686, 71 Am. St. Rep. 225, 43 Atl. 143, it is stated that a traveler on a highway cannot be injured through a defect in the highway, within the meaning of a statute giving a right of action against a town for an injury caused by a defective road or bridge, when the culpable negligence of a fellow-traveler is a proximate cause of his injury. Other cases lay down the doctrine that when the negligence of a township in allowing a highway to remain out of repair concurs with an extraordinary outside cause in producing an injury, the township is not liable, but the concurrence of an ordinary outside cause with such negligence will not so relieve it: *Schaeffer v. Jackson Township*, 150 Pa. St. 145, 30 Am. St. Rep. 792, 24 Atl. 629; *Carterville v. Cook*, 129 Ill. 152, 16 Am. St. Rep. 248, 22 N. E. 14.

The Doctrine of Proximate Cause is the subject of the monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807-861.

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### IRWIN v. MARQUETT.

[26 Ind. App. 383, 59 N. E. 38.]

**CHECKS FOR MONEY WON AT GAMING—INVALIDITY OF.**—Under the statute of Indiana, a check given for money won at playing cards is void in the hands of a bona fide holder for value.

S. Stansifer and C. S. Baker, for the appellant.

**383** ROBINSON, J. Appellant, as indorsee, sued appellee upon a check drawn by appellee and payable to W. S. Bedgood, and indorsed by Bedgood to appellant.

Appellee answered that before making the check Bedgood and appellee played at cards; that Bedgood won of appellee four hundred dollars, for which the check was given; that the check was given for no other consideration whatever. Overruling a demurrer to this answer is the only question presented.

**384** It is well settled by the authorities that, no matter how illegal or immoral the consideration of a note or bill, it is valid in the hands of a bona fide holder for value, unless some statute makes the instrument absolutely void: *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 23, 18 N. E. 687; *Third Nat. Bank v. Harrison*, 10 Fed. 243; *Eagle v. Kohn*, 84 Ill. 292; *Cazet v. Field*, 9 Gray, 329; 1 *Parsons on Notes and Bills*, 218; *Daniel on Negotiable Instruments*, 4th ed., sec. 197; *Story on Promissory Notes*, 6th ed., sec. 192; *Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. 281.

In *Story on Bills of Exchange*, fourth edition, section 188, the author says: "A bona fide holder for value, without notice,



is entitled to recover upon any negotiable instrument which he has received before it has become due, notwithstanding any defect or infirmity in the title of the person from whom he derived it; as, for example, even though such person may have acquired it by fraud, or even by theft or robbery."

The above rule goes only to the consideration, and such bona fide holder is not protected against the defense of the maker's incapacity to make the paper, but he takes it with constructive notice of all legal disabilities of the parties, such as infancy, coverture, or unsoundness of mind: *McClain v. Davis*, 77 Ind. 419; *Voris v. Harshbarger*, 11 Ind. App. 555, 39 N. E. 521.

Section 6675 of Burns' Revised Statutes of 1894 (*Horner's Rev. Stats.*, sec. 4950), provides: "All notes, bills, bonds, conveyances, contracts, mortgages, or other securities made hereafter, when the whole or any part of the consideration thereof shall be for money or other valuable thing won on the result of any wager, or for repaying any money lent at the time of such wager, for the purpose of being wagered, shall be void."

The question in this case is, therefore, whether commercial paper in the hands of a bona fide holder, for value, is subject, because of the statute above set out, to the defense that it was given upon a gaming consideration.

It is the law that in a suit by a bona fide holder against <sup>383</sup>an indorser the latter cannot defend on the ground that the original contract was based on a gaming consideration, for the reason that the indorsement is a separate and independent contract, and the indorser by his indorsement warrants the validity of the original contract: *Daniel on Negotiable Instruments*, sec. 671 et seq.; *Chitty on Bills*, 11th Eng. ed., 179-181; *Johnston v. Dickson*, 1 Blackf. 256; 1 *Parsons on Notes and Bills*, 217, 218; *Edwards v. Dick*, 4 Barn. & Ald. 212, 6 Eng. Com. L. 455; *Edwards on Bills*, 289, 350; *Story on Promissory Notes*, 16th ed., sec. 193; *Story on Bills of Exchange*, secs. 111, 112, 225; *Tiedeman on Commercial Paper*, sec. 259; *Fish v. First Nat. Bank*, 42 Mich. 203, 3 N. W. 849.

The law-merchant grew out of the necessity and convenience of business, and, although different from the general rules of the common law, it was engrafted into it, and became a part of it: 1 *Chitty's Blackstone's Commentaries*, 75. As administered in England, it became a part of the law of this state upon the adoption of the constitution. It has always been in force in this state, and is still in force unchanged in any way, except that notes, to be negotiable as inland bills of exchange,

must be payable to order, or bearer, in a bank in this state, and the further exception in a matter of practice allowing an equitable assignee to maintain an action at law in his own name: Burns' Rev. Stats. 1894, secs. 7515-7520. So that the holder of commercial paper by indorsement, before due, for value, and without notice, is protected by the law-merchant against the maker's defense of gaming consideration, unless the law-merchant has in that particular been superseded by section 6675 above set out.

The statute, 16 Charles II, chapter 7, was an act against deceitful, disorderly, and excessive gaming, and provided that such contracts, etc., "shall be utterly void and of none effect." Under this statute the case of *Hussey v. Jacob*, 1 Salk. 344, was decided, in which Holt, C. J., said: "If A wins one hundred pounds of B, and for a debt which A owes C he appoints B to give C a bond, it is good; C is an innocent person, and it will be the same thing if A be bound with him."

<sup>386</sup> The statute of 9 Anne, chapter 14, was for the better preventing excessive and deceitful gaming, and provided that notes, etc., given for a gaming consideration should be "utterly void, frustrate, and of none effect, to all intents and purposes whatsoever, any statute, law, or usage to the contrary thereof in any wise notwithstanding." Under this statute the case of *Bowyer v. Brampton*, 2 Strange, 1155, was decided, in which it was held that an indorsee for value and without notice could not recover against the makers of promissory notes given for money advanced to game with at dice. In the opinion it is said: "As to what Holt said in *Hussey v. Jacob*, it was not the point adjudged."

In *Edwards v. Dick*, 4 Barn. & Ald. 212, 6 Eng. Com. L. 455, the action was by an indorsee of a bill of exchange against the defendant as drawer and indorser. A recovery was had on the ground that the case did not come within the purview of the statute, 9 Anne. In answer to the argument that if a recovery was had the bill would be valid to some purposes, Abbott, C. J., said: "But, I think we must understand the language of the legislature with reference to the object which they then had in view, viz., the prevention of gaming; and that will be effectually accomplished by holding the securities to be void for any purpose of enforcing payment of the money won at play. The drawer, therefore, of such a bill of exchange cannot maintain any action against the acceptor. Now if he could, by passing the bill to a third person, enable him to sue

the acceptor, that would be within the mischief of the act. It follows, therefore, that no person deriving title through the drawer can be in a different situation from him so as to sue the acceptor. The case of *Bowyer v. Brampton*, 2 Strange, 1155, falls within this rule, for there the action was brought against the loser, to recover money lost at play, and the court properly held that the action would not lie. . . . Upon the whole, I am of opinion that we shall best effectuate the intention of the legislature by saying that this bill is void for every purpose <sup>387</sup> which it was the object of the statute of 9 Anne, chapter 14, section 1, to prevent. No person, therefore, who derives his title through the winner, can make the loser pay. But for the purpose of preventing fraud, we cannot permit the defendant to set up his own gaming as a defense; and therefore I think that the words of the statute do not extend to the present case, and that this rule ought to be refused."

The provisions of the statute of 9 Anne have been declared to be in force in many of the states, and the case of *Bowyer v. Brampton*, 2 Strange, 1155, has often been cited. The provisions of that statute were afterward modified by statute and such securities were deemed to have been made for an illegal consideration: *Hay v. Ayling*, 16 Ad. & E. 423, 71 Eng. Com. L. 423.

The language of the present statute, enacted in 1852, is that such instruments "shall be void": Rev. Stats. 1852, p. 305. In 1824, the language was "shall be utterly void and of no effect, to all intents and purposes whatsoever": Rev. Stats. 1824, p. 223. The same language remained through the revisions of 1831, 1838, and 1843: Rev. Stats. 1831, p. 282; Rev. Stats. 1838, p. 324; Rev. Stats. 1843, p. 593. An act approved January 29, 1818, used the words "shall be utterly void, frustrate, and of no effect to all intents and purposes whatsoever": Acts 1817-18, p. 88, sec. 40. An act approved December 30, 1816, said, "shall be utterly void, frustrated, and of no effect to all intents and purposes whatsoever, any law, usage, or custom to the contrary notwithstanding": Acts 1816-17, p. 92, sec. 1. Whether in these enactments the legislature intended to restrict the meaning of the statute, or was prompted by a commendable desire to be brief and to the point, we do not think it necessary to inquire for the purposes of this case. We must give the words used their ordinary meaning. There is nothing in the act which shows the legislature intended they should have any other meaning. If it was intended to except commercial paper



under certain circumstances from the provisions of the act, the legislature should have made the exception.

<sup>388</sup> It is insisted by counsel that the word "void" used in the statute should be construed to mean "voidable" only, and that that is the usual and ordinary sense in which the word is used. Much confusion has grown out of the ill-advised and inaccurate use of the words "void" and "voidable." Where the purpose of a statute is to protect a person presumably unable to protect himself, the word 'void' may, with good reason, be construed under certain circumstances to mean voidable only. But we know of no reason for applying this rule to a statute whose purpose is to subserve a public policy. The second and fourth sections of the act in question provide for recovering back the money or property lost. But we agree with counsel for appellant that the purpose of the statute in question "is not the protection of the loser." Having been a wrongdoer it is not the policy of the law to protect him. The purpose of the statute is the suppression of gaming, and it was manifestly intended to be in aid of the statute punishing gaming. The species of gaming now being considered is by statute made a misdemeanor. While the act does affect the parties to the instrument, yet its chief object is to affect the instrument itself. The instrument is declared void by the statute, not only because it has no legal consideration to support it, but also because it is against public policy to make such a contract. It was a complete nullity from the moment it was made. It never had any value. If it is protected in the hands of anyone it is thus recognized as a thing of value. The winner could not recover upon the check against the loser. To permit him to accept from the loser commercial paper, and by indorsement give the holder a right to sue the loser, would make the statute of no avail to prevent gaming.

In this state the word "void" used in certain statutes has been construed to mean voidable only. "Every contract, sale, or conveyance of any person while of unsound mind shall be void": Burns' Rev. Stats. 1894, sec. 2724. The word "void" in that statute has been construed "voidable," in reference to <sup>389</sup> the contract of a person whose unsoundness of mind has not been judicially ascertained: *Crouse v. Holman*, 19 Ind. 30; *Hardenbrook v. Sherwood*, 72 Ind. 403. But where the fact of unsoundness has been judicially ascertained, the word "void" is not so construed: *Redden v. Baker*, 86 Ind. 191; *Musselman v. Cravens*, 47 Ind. 1. Strictly speaking, "void" has not been

rendered "voidable," but the words "whose unsoundness of mind has been judicially determined" have been read into this statute. Until the unsoundness has been judicially determined, the contract is voidable, but after such determination the contract is an absolute nullity.

"A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void": Burns' Rev. Stats. 1894, sec. 6964. It will be noticed "that such contract as to her shall be void." Accordingly, it has always been held that her coverture is a personal defense, and that such a contract can only be avoided by her and her privies in blood or representation: Lackey v. Boruff, 152 Ind. 371, 53 N. E. 412, and cases there cited; Bennett v. Mattingly, 110 Ind. 197, 202, 10 N. E. 299, 11 N. E. 792.

It is manifest that the only purpose of the above statute is to protect persons presumably unable to protect themselves; that is, to protect the party who made the contract. They were not enacted to subserve any public policy.

As is said in Maxwell on Interpretation of Statutes, second edition, 256: "In general, however, it would seem that where the enactment has relation only to the benefit of particular persons, the word 'void' would be understood as 'voidable' only, at the election of the persons for whose protection the enactment was made, and who are capable of protecting themselves; but that when it relates to persons not capable of protecting themselves, or when it has some object of public policy in view which requires the strict construction, the word receives its natural full force and effect": Rex v. Hipswell, 15 Eng. Com. L. 267, 8 Barn. & C. 471; Pearse v. <sup>390</sup>Morrice, 29 Eng. Com. L. 59, 2 Ad. & E. 84; Boynton v. Hubbard, 7 Mass. 112; Van Shaack v. Robins, 36 Iowa, 201, 205; Smith v. Saxton, 6 Pick. 483.

Counsel cite the following cases where the word "void" in a statute has been construed to mean "voidable" only: Green v. Kemp, 13 Mass. 515, 7 Am. Dec. 169; Ewell v. Daggs, 108 U. S. 144, 2 Sup. Ct. Rep. 408; Hussey v. Jacob, 1 Salk. 344; Kerrison v. Cole, 8 East, 234; St. Nicholas' Case, 2 Strange, 1066; Magdalen Hosp. v. Knotts, L. R. 4 App. Cas. 324.

In Green v. Kemp, 13 Mass. 515, 7 Am. Dec. 169, a purchaser of the mere equity of redemption could not avoid a mortgage by plea or proof of usury, although a statute declared all mortgages on a usurious consideration void.

In *Ewell v. Daggs*, 108 U. S. 144, 2 Sup. Ct. Rep. 408, a Texas statute declared a contract of loan at a greater rate than twelve per cent per annum "to be void and of no effect for the whole premium or rate of interest only." This provision of the usury law was repealed by a constitutional provision and while the opinion does say that the word "void" might be rendered "voidable" only, yet the decision in that case seems to rest upon the principle that as the repeal operated retrospectively it thus cut off the defense of usury.

*Hussey v. Jacob*, 1 Salk. 344, was decided under the statute 16 Charles II, which used the words "shall be utterly void and of none effect." Afterward, *Bowyer v. Brampton*, 2 Strange, 1155, was decided under the statute of 9 Anne, chapter 14, in which it was said: "As to what Holt said in *Hussey v. Jacob*, it was not the point adjudged."

In *Kerrison v. Cole*, 8 East, 231, a statute provided that a transfer of property in a ship should recite the certificate of registry therein, otherwise such bill of sale "should be utterly null and void to all intents and purposes." It was held that though such a bill, given as a mortgage, might be void for failure to comply with the statute, yet the party giving it might be sued upon his personal covenant contained <sup>391</sup> in the same instrument for the repayment of the money lent.

In *St. Nicholas' Case*, 2 Strange, 1066, the statute, 5 Elizabeth, chapter 4, declared: "That all indentures, covenants, promises, and bargains of or for the having, taking, or keeping of any apprentice, otherwise hereafter to be made or taken, than is by this statute limited, ordained, and appointed, shall be clearly void in the law, to all intents and purposes." The statute provided the lending should be for seven years. In holding an apprentice bound for four years only gained a settlement, it was said: "Here the indenture has had its effect, and neither master nor servant has taken advantage of the objection." In the case of *Currenden and Laland*, reported in the same volume, page 903, the statute of 8 Anne, chapter 9, required a duty to be paid on indentures, and if not paid the indenture to be void. The apprentice served three years, but the master had never paid the duty of sixpence. It was held a settlement because the master had six months to pay the duty in, and during these six months a settlement was gained, and that it should not be in the power of the master to defeat it by matter ex post facto. But the order was quashed because the statute made such an indenture void to all intents and purposes whatever.



In *Magdalen Hosp. v. Knotts*, L. R. 4 App. Cas. 324, statute 13 Elizabeth, chapter 10, provided that certain deeds of certain kinds of property by spiritual persons "shall be utterly void and of none effect, to all intents, constructions, and purposes, any law, custom or usage to the contrary any ways notwithstanding." The governors of Magdalen hospital made a lease in 1783 of certain hospital lands for ninety-nine years at the rent of one peppercorn, if lawfully demanded. In 1876 the governors brought an action to recover possession of the leased land. The court of appeal held the lease voidable, but that the right to enter and avoid it accrued to the hospital immediately after the lease was made, and was therefore barred at the end of twenty<sup>392</sup> years. Upon appeal the lease was held absolutely void, but the case was affirmed on the ground that the action was barred.

Keeping in view the policy of the statute, that its object is to suppress the evils arising from gaming, we think the words used should be given their ordinary legal signification, and while hardships may arise in individual cases in the enforcement of such a statute, yet we believe they are second in importance to the public policy to be subserved by such a statute. Besides, as is said by Lord Mansfield in *Lowe v. Waller*, 2 Doug. 736: "It is less mischievous that the law should be as it is with respect to bills and notes than other securities; because they are generally payable in a short time, so that the indorsee has an early opportunity of recurring to the indorser, if he cannot recover upon the bill."

To give the statute the construction contended for by counsel, we must in effect read into the statute an exception from its provisions. This we think is a matter for the legislature, and not the courts. In some states the statute excepts from its operation bona fide holders for value and without notice: Mich. Comp. Laws 1897, sec. 5933; Me. Rev. Stats. 1883, c. 125, sec. 10.

The statute in question makes the contract sued on void because of its illegal consideration, and it seems to be the settled doctrine of the courts and text-writers that commercial paper founded on such a consideration, and which a statute in direct terms declares shall be void, is void, even in the hands of a bona fide holder: Daniel on Negotiable Instruments, 4th ed., secs. 197, 807; Tiedeman on Commercial Paper, sec. 178; 2 Randolph on Commercial Paper, sec. 517; Chitty on Bills, 12th Am. ed., 108; 3 Kent's Commentaries, 13th ed., 80; Edwards on Bills of Exchange, 337; Norton on Bills and Notes, 3d ed., 234;

1 Parsons on Notes and Bills, 218; Vallett v. Parker, 6 Wend. 615; Woodson v. Barrett, 2 Hen. & M. 80, 3 Am. Dec. 612; Traders' Bank v. Alsop, 64 Iowa, 97, 19 N. W. 863; Lagonda <sup>303</sup> Nat. Bank v. Portner, 46 Ohio St. 381, 21 N. E. 634; Snoddy v. Bank, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127; Mordecai v. Dawkins, 9 Rich. 262; Conklin v. Roberts, 36 Conn. 461; Kuhl v. Gally etc. Press Co., 123 Ala. 452, 82 Am. St. Rep. 135, 26 South. 535; Cunningham v. National Bank, 71 Ga. 400, 51 Am. Rep. 266; Bank v. Vankirk, 39 Ill. App. 23; Morton v. Fletcher, 2 A. K. Marsh. 137, 12 Am. Dec. 366; Emmerson v. Townsend, 73 Md. 224, 20 Atl. 984; Root v. Merriam, 27 Fed. 909; Harper v. Young, 112 Pa. St. 419, 3 Atl. 670; Chapin v. Dake, 57 Ill. 295, 11 Am. Rep. 15; Taylor v. Beck, 3 Rand. 316; Evans v. Cook, 11 Nev. 69; Bowyer v. Brampton, 2 Strange, 1155; Hitchcock v. Way, 6 Ad. & E. 943, 33 Eng. Com. L. 249; Shillito v. Theed, 7 Bing. 406, 20 Eng. Com. L. 184; Summerfeldt v. Worts, 12 Ont. 48; Henderson v. Brunson, 8 Price, 281; Eagle v. Kohn, 84 Ill. 292; Wyatt v. Wallace, 67 Ark. 575, 55 S. W. 1105; Glenn v. Farmers' Bank, 70 N. C. 191. See, also, Aurora v. West, 22 Ind. 88, 85 Am. Dec. 413; Vories v. Nussbaum, 131 Ind. 267, 269, 31 N. E. 70; Spray v. Burk, 123 Ind. 565, 568, 24 N. E. 588; Sondheim v. Gilbert, 117 Ind. 71, 77, 10 Am. St. Rep. 23, 18 N. E. 687.

The same is true under statutes against usury. In Bacon v. Lee, 4 Iowa, 490, it is said: "Where a statute against usury provides that the usurious contract is void, then no subsequent circumstances can make the original contract good; and a promissory negotiable note, void at its inception for usury, is equally void in the hands of an innocent indorsee": See Bridge v. Hubbard, 15 Mass. 96, 8 Am. Dec. 86; Kendall v. Robertson, 12 Cush. 156; Wilkie v. Roosevelt, 3 Johns. Cas. 206, 2 Am. Dec. 149; Chapman v. Black, 2 Barn. & Ald. 588; Lowes v. Mazzaredo, 1 Stark. (385), 310; Lowe v. Waller, 2 Doug. 736.

In Bayley v. Taber, 5 Mass. 286, 4 Am. Dec. 57, a statute required notes to be wholly in writing, and that notes bearing the impression of types, plates, or printing should be void, and no <sup>304</sup> action maintained thereon; held, such notes were void in the hands of a bona fide holder for value.

Under an Ohio statute providing that: "All promises, agreements, notes, bills, bonds, or other contracts, . . . when the whole or any part of the consideration of such promise . . . is for money . . . won or lost . . . upon any game . . . whatever, . . . shall be absolutely void, and of no effect," it

was held the indorsee of a check given for money lost at a game at cards cannot recover against the drawer, though a bona fide holder for value without notice of the vice in the consideration: *Lagonda Nat. Bank v. Portner*, 46 Ohio St. 381, 21 N. E. 634.

In *Groves v. Clark*, 21 La. Ann. 567, the state constitution made void all contracts for the sale of persons; held, that the third holder of a promissory note given for the price of a slave could not recover thereon although a good faith purchaser for value before maturity.

In *Weed v. Bond*, 21 Ga. 195, a statute made contracts between parties and attorneys at law void if the attorney failed to attend the suit; held, a promissory note given for services, and the attorney failed to attend, was void in the hands of an innocent transferee.

In *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386, a note given for a patent right did not have the words required by the statute inserted in the note. The question was whether such a note was protected in the hands of a bona fide holder. The statute did not in terms declare such a note void, and it was held that it did not declare it void by necessary implication, and that the note was valid in the hands of an innocent holder. In the course of the opinion the court said: "The decisions agree that, where the statute in direct terms declares that a note given in violation of its provisions shall be void, it is so no matter into whose hands it may pass. The rule is thus stated by the court in *Vallett v. Parker*, 6 Wend. 615: 'Wherever the statute declares notes void, they are <sup>395</sup> and must be so in the hands of every holder; but where they are adjudged by the court to be so for failure or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of, the consideration.' It is said by a late writer, in stating the same general rule, that, 'when a statute, expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it': 1 *Daniel on Negotiable Instruments*, sec. 197. We regard this author's statement as substantially expressing the general rule": See *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 23, and note, 18 N. E. 687.

While the exact question here was not involved in the above case, yet the holding upon the point cannot be considered as mere obiter dicta. The decisions in other jurisdictions, from many of which we have cited cases, are agreed that the direct



terms of a statute make the paper void in the hands of any holder. In view of these decisions and the purposes of the statute, we cannot put into the statute an exception which, from the language used, the legislature may or may not have intended. If it is thought best that the statute should be so construed, the change should be made by the legislature, and not by the courts.

Judgment affirmed.

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**A Note Given in Consideration of a Gaming Contract is void in the hands of a bona fide holder:** Snoddy v. Bank, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127; Swinney v. Edwards, 8 Wyo. 54, 80 Am. St. Rep. 916, 55 Pac. 306. Compare Sondheim v. Gilbert, 117 Ind. 71, 10 Am. St. Rep. 23, 18 N. E. 687; Lynchburg Nat. Bank v. Scott, 91 Va. 652, 50 Am. St. Rep. 860, 22 S. E. 487.

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### BUGH v. CRUM.

[26 Ind. App. 465, 59 N. E. 1076.]

**SURETYSHIP — RELEASE OF SURETY — EXTENDING TIME OF PAYMENT.**—A surety on a promissory note is released, where the payee, without the surety's knowledge or consent, extends the time of payment and takes a note for the accrued interest, which bears interest from its date, for the agreement to thus pay compound interest is a sufficient consideration for the agreement of extension.

N. K. Todd, J. S. Dailey, A. Simmons, and F. C. Dailey, for the appellant.

A. L. Sharpe and C. E. Sturgis, for the appellees.

**466 HENLEY, C. J.** This was an action by appellant against appellees upon a promissory note. Appellee Crum was principal and appellee Motz surety on the note sued on. Motz answered separately, averring the fact that he was a surety on said note and received no part of the consideration on account of his signing the same, all of which facts appellant well knew. That without the knowledge or consent of this appellee, appellant extended the time of payment of said note for twelve months, and as a consideration therefor appellee Crum, the principal in said note, executed and delivered to appellant a note for forty-four dollars, due one day after date, and bearing interest at the rate of eight per cent per annum from date, and attorneys' fees, and payable at the Studabaker Bank at Bluffton,

**Indiana.** That a part of said note represented the accrued interest on the note sued on in this action. The issue tried was made upon this answer. The surety, Motz, was released. The question upon appeal is as to the sufficiency of the evidence to sustain the verdict.

It is conceded that the law is correctly stated in the case of *Voris v. Shotts*, 20 Ind. App. 220, 50 N. E. 484, where it is said: "It is necessary to the release of a surety upon a promissory note, by reason of the extension of the time of payment of the note, that the extension should be for a definite period; that it should be for a valuable consideration; that it should be done without the consent of the surety, and that the holder of the note should have knowledge of the fact that the person seeking the release for such cause is a surety."

It is admitted by counsel for appellant that the evidence <sup>467</sup> is sufficient in every respect, except that it wholly fails to show a valuable consideration for the extension of time of payment. The evidence shows that the principal in the note executed to the payee his note for the accrued interest, which last note bore interest at the rate of eight per cent per annum from date. The execution of the note for the accrued interest was the consideration upon which the time of payment was extended. Was this a sufficient consideration?

The supreme court of this state has uniformly held that if, after a debt bearing interest becomes due, the creditor agrees to extend the time of payment for a definite period upon the payment of the interest due, there is no consideration for the promise, and the surety is not thereby released: *Hume v. Mazelin*, 84 Ind. 574; *Starret v. Burkhalter*, 70 Ind. 285; *Hamilton v. Winterrowd*, 43 Ind. 393; *Christman v. Tuttle*, 59 Ind. 155; *Holmes v. Boyd*, 90 Ind. 332.

The rule of law as established by the above decisions is tersely stated by Niblack, J., in *Holmes v. Boyd*, 9 Ind. 332, as follows: "Neither the payment of interest already accrued nor a promise to pay such interest as may thereafter lawfully accrue upon a note will afford a sufficient consideration for an agreement to extend the time of payment of the note." The same rule has been established by the supreme court of Illinois: *Crossman v. Wohlleben*, 90 Ill. 537. But a majority of the courts of this country have held a contrary doctrine, the reasoning being well expressed by Reed, J., in *McComb v. Kittridge*, 14 Ohio, 348, as follows: "It is a valuable right to have money placed at interest, and it is a valuable right to have

the privilege, at any time, of getting rid of the payment of interest, by discharging the principal. By this contract, the right to interest is secured for a given period, and the right to pay off the principal, and get rid of paying the interest, is also relinquished for such period. Here, then, are all the elements of a binding contract." To the same effect, see *Fowler v. Brooks*, 13 N. H. 240; *Chute* <sup>468</sup> *v. Pattee*, 37 Me. 102; *Robinson v. Miller*, 2 Bush, 179; *Brandt on Guaranty and Suretyship*, sec. 354.

Adhering to the rule established by our supreme court, we must hold that the mere payment of interest and the extension of the time of payment of the principal for a definite time did not release the surety. But in this case something more was done. Under the agreement a note was given for the interest due, and this note bore interest from its date. The agreement was not simply to pay the interest due; it was to pay compound interest, and this was a sufficient consideration for the agreement to extend the time of payment, and it released the surety on the note. The payee of the note testified that he took the note for the interest, and extended the time of payment of the principal because by so doing he would get interest upon the interest due. The surety established every element necessary for his discharge. We find no error.

Judgment affirmed.

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**Release of Surety.**—An extension of time, without the consent of a surety, discharges him: *Jenkins v. Daniel*, 125 N. C. 161, 74 Am. St. Rep. 632, 34 S. E. 239; as where the payment of a note is extended in consideration of the prepayment of interest: *Hallock v. Yankey*, 102 Wis. 41, 72 Am. St. Rep. 861, 78 N. W. 156; or the payment of interest semi-annually instead of annually, as stipulated for in the note: *Scott v. Fisher*, 110 N. C. 311, 28 Am. St. Rep. 688, 14 S. E. 799. It is otherwise where the extension of time for full payment is made in consideration for part payment: *Sully v. Childress*, 106 Tenn. 109, 82 Am. St. Rep. 875, 60 S. W. 499. The payment of usurious interest for time already elapsed constitutes a consideration for the extension of the time of payment of an obligation: *Lemmon v. Whitman*, 75 Ind. 318, 39 Am. Rep. 150.



## PEOPLE'S STATE BANK OF BROWNSTOWN v. JONES.

[28 Ind. App. 583, 58 N. E. 852.]

**PATENTS—SALE OF RIGHTS—NOTE GIVEN FOR—DEFENSE.**—A STATUTE relating to the sale of patent rights, which, among other things, requires the words "given for a patent right" to be inserted in any obligation taken therefor, relates to the sale of the intangible right secured by the letters patent, and not to articles manufactured under the patent. Hence, if the patentee transfers the exclusive right and privilege of selling for use a certain article for which he claims to have a patent, and takes a note therefor, it is no defense to an action thereon that the note does not contain the words quoted, or that other acts prescribed by the statute have not been performed.

J. C. Lawler and W. T. Branaman, for the appellant.

O. H. Montgomery, D. A. Kochenor, and M. B. Hottel, for the appellee.

**583** COMSTOCK, J. This action was commenced in the Jackson circuit court and upon change of venue was tried in the Washington circuit court.

**584** The complaint is in two paragraphs, each based on a promissory note for one hundred and fifty dollars, in the usual form, payable at a bank of this state to the order of one Wheeler, and assigned by him by written indorsement on the back thereof before maturity for a valuable consideration to the appellant. The cause was put at issue and a trial resulted in a judgment for costs in favor of appellee. The answer is in two paragraphs. The first and third specifications of error challenge the sufficiency of these paragraphs respectively. The first paragraph is as follows: "The defendant, for answer to the complaint herein, says that he admits the execution of the notes sued on, and that thirty dollars is a reasonable fee for the collection of each of said notes, and that the same are due and wholly unpaid, and admits all other material averments of the complaint to be true, but he avers that said notes were executed in consideration for the sale and transfer to him by one W. J. Gooch and the Portable Pantry Company of the exclusive right and privilege of selling for use of certain portable pantries in Warren county, Indiana, until the first day of January, 1903, for which portable pantries the said W. J. Gooch claimed to have obtained letters patent of the United States. That said sale and transfer of the right to sell said alleged patented article took place and

was consummated at Brownstown, in Jackson county, Indiana, on the seventh day of December, 1897, and that said W. J. Gooch had not, nor had anyone else, then and there filed with the clerk of the court of said county a copy of his alleged letters patent, nor was any affidavit filed that such letters were genuine and had not been revoked or annulled, and that he and said Portable Pantry Company had full authority to sell or barter the right so patented. Nor was any affidavit so filed giving the name, age, occupation, and residence of said alleged patentee or his agent." And, further, that there is no clause in either of said notes containing the statement "given for a patent right," and that the plaintiff knew that said notes were given for an alleged patent right at the time <sup>585</sup> it purchased the same. The averments of the second paragraph are, as stated in appellee's brief, "in substance and theory the same as those of the first." These answers are founded upon sections 6054, 6055, and 6056 of the Revised Statutes of 1881.

Section 6055 is as follows: "Any person who may take any obligation, in writing, for which any patent right, or right claimed by him or her to be a patent right, shall form the whole or any part of the consideration, shall, before it is signed by the maker or makers, insert in the body of said written obligation, above the signature of said maker or makers, in legible writing or print, the words 'given for a patent right.'"

The answers, to be good under this section, must aver facts showing that the consideration in whole or in part for which said notes were given was a patent right or a right claimed to be a patent right. Do they contain such averments? The only averment of consideration in either paragraph is "that said notes were executed in consideration for the sale and transfer to him by one W. J. Gooch and the Portable Pantry Company of the exclusive right and privilege of selling for use of certain portable pantries in Warren county, Indiana, until the first day of January, 1903." The consideration thus alleged is only the transfer of the exclusive right to sell a manufactured article, a tangible thing, for a limited time in a particular locality.

In *Hankey v. Downey*, 116 Ind. 118, 18 N. E. 271, the supreme court distinguish between the tangible thing manufactured under a patent and the intangible right evidenced by the patent, saying, by Elliott, J., at page 119 (116 Ind., 18 N. E. 272): "The difference between the article manufactured and the right secured by the patent is clearly recognized." And at page 120 (116 Ind., 18 N. E. 272): "As there is a distinc-

tion between the intangible right and the tangible thing manufactured under the right, and as the statute uses words embracing only the intangible right, it cannot be extended by construction to tangible articles manufactured under letters patent. The words used in the statute have a clear <sup>586</sup> and well-defined meaning, and that meaning we must ascribe to them. If, however, we were compelled to look beyond the words, we should not hesitate to hold that it was not the intention of the legislature to compel every merchant or dealer who sells articles manufactured under a patent to perform the acts prescribed by the statute, but that the intention was to compel the performance of those acts by vendors of the intangible rights secured by the letters patent. This intention is quite apparent when the general scope and purpose of the statute are given consideration, but, as we have said, the words themselves are unequivocal and clear." This expression of the supreme court is decisive of the question presented by the demurrers to the first and second paragraphs of answer.

Counsel for appellee in their able brief strongly rely upon the case of *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386. It is also claimed that like answers were held good in *State Nat. Bank v. Bennett*, 3 Ind. App. 680, 36 N. E. 551, and in *Robertson v. Cooper*, 1 Ind. App. 78, 27 N. E. 104. In the two cases last named no question appears to have been raised on the pleadings. In *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386, the court say: "It is a sale of the patented right to sell the exclusive right to use and manufacture for sale and use the thing patented, for such a sale carries with it an interest in the patented right itself. Where the vendor sells a right to use and to manufacture for sale and use during the existence of the patent, he parts with all substantial rights in the patent in the territory embraced in the assignment: *Curtis on Patents*, sec. 181; *Walker on Patents*, sec. 296."

From the foregoing expression of the supreme court, counsel for appellee argue that the sale of the exclusive right to sell for use the patented article carries with it an interest in the patent right itself. We think that this deduction is not sound; it would lead to the conclusion that dealers who sell articles manufactured under a patent should perform the acts prescribed by the statute under consideration. The <sup>587</sup> same able judge spoke for the court in *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386, and *Hankey v. Downey*, 116 Ind. 118, 18 N. E. 271. In the case last named, it is said: "In *New*



v. Walker, we affirmed that the statute was valid because it provided for the protection of the citizens by making provisions applicable to property of a unique character, for property of an intangible nature secured by an exercise of a governmental power of a peculiar kind, and operative only upon a single class of rights. The decisions in *State v. Peck*, 25 Ohio St. 26, and *Tod v. Wick etc. Co.*, 36 Ohio St. 370, declare that a statute similar to ours is valid, but that it does not apply to articles manufactured under a patent. The distinction between the tangible thing and the intangible right is clearly established and maintained in very able opinions. Other cases declare a like doctrine: *Webber v. Virginia*, 103 U. S. 344; *Stephens v. Cady*, 14 How. 528; *Stevens v. Gladding*, 17 How. 447; *Patterson v. Kentucky*, 97 U. S. 501; *Palmer v. State*, 39 Ohio St. 236, 48 Am. Rep. 429; *Woollen v. Banker*, 17 Alb. L. J. 72, 2 Flip. 33, Fed. Cas. No. 18,030." Under the decisions cited, we see no escape from the conclusion that the trial court erred in overruling the demurrers to the answers. This conclusion renders it unnecessary to consider the other specifications of errors.

The judgment is reversed, with instructions to sustain the demurrers to the first and second paragraphs of appellee's answer.

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**Patent Right.**—A statute requiring that the words "given for a patent right" shall be inserted in any obligation, the consideration whereof is a patent right, is valid, and a promissory note taken by a vendor of a patent right which does not contain these words is inoperative as between the parties and those who buy with notice: *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386. See, further, *Mason v. McLeod*, 57 Kan. 105, 57 Am. St. Rep. 327, 45 Pac. 76.

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## GUETHLER v. ALTMAN.

[26 Ind. App. 587, 60 N. E. 355.]

**ACTIONS—MALICIOUS EXERCISE OF LEGAL RIGHT.**—An act which is lawful in itself, and which violates no right, cannot be made actionable because of the motive which induced it. A malicious motive will not make that wrong which in its own essence is lawful.

**DAMAGES—INJURY TO BUSINESS THROUGH PERSUASION NOT TO PATRONIZE IT.**—A dealer in confectioneries and school supplies has no right of action for damages against a school teacher for maliciously advising or persuading his pupils not to patronize the plaintiff's store.

J. S. Branyan and E. Searles, for the appellant.

O. W. Whitelock, S. E. Cook, and U. S. Lesh, for the appellees.

**588** ROBINSON, J. Appellant avers in his complaint that appellees Altman, Minnich, and Ewing compose the school board of the city of Huntington; that appellee Hamilton is the superintendent of the schools, employed by the board, and that appellee Crull is a teacher in the schools in the employ of the board and under the jurisdiction and control of the superintendent; that appellant is a citizen of the city of Huntington, engaged in the confectionery and school supply business, and that a large portion of his trade is obtained from the pupils of the school; that the city high school is located across the street from appellant's place of business, and that appellee Crull, as teacher, has particular charge and control of the pupils who attend the high school; that for several months past appellee Crull "has made continual and increasing efforts, by means of persuasion and threats and intimidation, to prevent the pupils of said high school over whom he had particular charge and control from visiting or patronizing plaintiff's place of business; that he has talked to the pupils, advising them to stay away from plaintiff's place of business and to purchase their school supplies elsewhere; that he has on many occasions in the last few months stood at a window in said high school building where he could watch plaintiff's store, and when high school pupils started to enter plaintiff's store door they would discover that they were being watched by said defendant Crull, and they would turn away and not enter, being in fear of said Crull"; that about December, 1898, appellee Crull wrote letters to the parents of the pupils, **589** each letter "containing a threat that if said pupils visited plaintiff's store they would be suspended from said high school"; that these letters contained no explanation of the threat made, but that the letters written by Crull were a part of a systematic effort of appellees to damage and injure appellant's business, and that all of the letters were written maliciously, and without reason or cause. It is also averred that when appellee Crull did the things above set out he was in the employ of the above-named appellees who composed the school board, and under the special jurisdiction and control of appellee Hamilton, who was in the employ of the board as superintendent, and that in doing the things named Crull was following instructions given him by such school

board and superintendent, and that all was done with the full knowledge of the board and superintendent; that "as a result of the threats and intimidation by defendants above set out the pupils of said high school were prevented from patronizing plaintiff's place of business, and plaintiff and his business were brought into disrepute and discredit among the people of the city of Huntington, to plaintiff's damage in the sum of five thousand dollars"; wherefore, etc. The sufficiency of the complaint as against demurrers by the several appellees is the only question presented.

The complaint does not state a cause of action against Crull for either slander or libel. He is not charged with having said anything of a slanderous character, nor is there anything in the letters referred to of a libelous character. From the averments of the pleading, if it is not held to be contradictory, ambiguous, and doubtful, it must be held to proceed upon the theory that Crull maliciously persuaded certain persons not to visit or patronize appellant's store. It was proper for the school authorities to make such reasonable rules and regulations as were necessary for the discipline, government, and management of the school. The complaint contains no charge of threats or intimidation within the legal meaning of those terms: Bouvier's Law Dictionary; Bouvier's Institutes, sec. 2234; Anderson's Law Dictionary.

<sup>590</sup> It was not an unlawful act for Crull to advise or persuade the pupils not to visit appellant's store. The fact that he acted maliciously does not change the rule. An act which is lawful in itself and which violates no right cannot be made actionable because of the motive which induced it. A malicious motive will not make that wrong which in its own essence is lawful: Chatfield v. Wilson, 28 Vt. 49; Jenkins v. Fowler, 24 Pa. St. 308; Glendon Iron Co. v. Uhler, 75 Pa. St. 467, 15 Am. Rep. 599; Frazier v. Brown, 12 Ohio St. 294; Mahan v. Brown, 13 Wend. 261, 28 Am. Dec. 461; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Cooley on Torts, 2d ed., 832; Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492.

There seems to be some conflict in the cases as to whether a party is liable in damages for wrongfully and maliciously inducing another to break a contract with a third party. The better reasoned cases hold there is no liability unless certain relations exist. In Lumley v. Gye, 2 El. & B. 216, 22 L. J. Q. B., N. S., 463, it is held there is a liability if the contract is for exclusive personal services. In Jones v. Stanley, 76 N.



C. 355, the rule is applied to every case where one person maliciously persuades another to break any contract with a third person. In *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492, it is held the action will not lie unless the relation of master and servant or other personal relation exists. *Bourlier v. Macauley*, 91 Ky. 135, 34 Am. St. Rep. 171, 15 S. W. 60, holds that the action will not lie unless the party breaking his contract has by coercion or deception been procured to do so against his will or contrary to his purpose, or the party breaking the contract is within the statutory exception of apprentices, menial servants, and others whose sole means of living is by manual labor: See, also, *Chambers v. Baldwin*, 91 Ky. 121, 34 Am. St. Rep. 165, 15 S. W. 57.

We know of no authority holding that an action will lie for maliciously persuading a party not to enter into a contract. <sup>591</sup> In *Allen v. Flood* (1898), L. R. App. Cas. 1, the jury found that Allen had maliciously induced the employers to discharge Flood and Taylor, and not to engage them, and gave them a verdict for damages. It was held that Allen had violated no legal right of Flood and Taylor, had done no unlawful act, and used no unlawful means in procuring their dismissal, that his conduct was therefore not actionable, however malicious or bad his motive might be, and that notwithstanding the verdict Allen was entitled to judgment: See *Lyons v. Wilkins* (1898), L. J. Ch. 383.

In the case at bar no contract relation existed, and reasoning from the above cases we must conclude that there is no right of action for maliciously persuading the pupils not to enter into any contract of purchase, or make any purchases, of merchandise from appellant. If the language used had imputed dishonesty or anything of a reproachful character, appellant could have his action, but that is not the case made by the pleading.

In *Payne v. Western etc. R. R. Co.*, 13 Lea, 507, 49 Am. Rep. 666, Payne, a merchant, had a large and profitable trade with employes of the company. The company circulated a notice that any employe who traded with Payne after that date would be discharged. It was averred that this was done maliciously. The court held that an action would not lie for the malicious posting of the notice. In *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373, it was held that an action would not lie by the owner of a house against one who prevented the renting of the house by maliciously refusing to employ any tenant of such

house. The complaint does not state a cause of action against appellee Crull, and for the same reason it is insufficient as against the other appellees.

Judgment affirmed.

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**One Having a Legal Right** can enforce its enjoyment without having his motive inquired into: *Bordeaux v. Greene*, 22 Mont. 254, 74 Am. St. Rep. 600, 56 Pac. 218.

**Damages.**—No action lies for the malicious posting of a notice by an employer forbidding his employes to trade with a person named therein: *Payne v. Western etc. R. R. Co.*, 13 Lea, 507, 49 Am. Rep. 668.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**IOWA.**

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**MERENESS v. FIRST NATIONAL BANK.**

[112 Iowa, 11, 83 N. W. 711.]

**LIMITATION OF ACTIONS—CERTIFICATE OF DEPOSIT.**  
The statute of limitations begins to run against a demand certificate of deposit from its date.

**LIMITATION OF ACTIONS—CERTIFICATE OF DEPOSIT—DEATH OF DEPOSITOR.**—The running of the statute of limitations against a certificate of deposit is not interrupted by the death of the depositor.

**LIMITATIONS OF ACTIONS—CERTIFICATE OF DEPOSIT—FRAUD AND CONCEALMENT.**—Denial by a bank to an administrator of liability on a lost certificate of deposit of his decedent, and that evidence of such liability existed in the books of the bank, though made with knowledge that such statement is false, is not such actual fraudulent concealment as will toll the statute of limitations as to the certificate of deposit.

Springer & Clary, for the appellant.

Ellis & Ellis, for the appellee.

<sup>12</sup> LADD, J. In the early case of *Bean v. Briggs*, 1 Iowa, 488, 63 Am. Dec. 464, this court held a time certificate of deposit, in the usual form, negotiable, for that it possessed all the characteristics of a promissory note. Story defines a "promissory note" <sup>13</sup> to be "a written engagement by one person to pay another person, therein named, absolutely and unconditionally a certain sum of money at a time specified therein": Story on Promissory Notes, sec. 1. The ordinary certificate of deposit is precisely within this definition, and it is generally held that such certificates are, in effect, promissory notes, and governed, with certain exceptions, by the same rules:



Klauber v. Biggerstaff, 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 357; Citizens' Nat. Bank v. Brown, 45 Ohio St. 39, 5 Am. St. Rep. 527, 11 N. E. 799; Institute v. Weedon, 18 Md. 320, 81 Am. Dec. 603; note to O'Neill v. Bradford, 42 Am. Dec. 575; 5 Am. & Eng. Ency. of Law, 2d ed., 803, and cases collected. The decisions reaching a contrary conclusion seem to rest on the peculiar wording of particular certificates: See Patterson v. Poindexter, 6 Watts & S. 227, 40 Am. Dec. 554; O'Neill v. Bradford, 42 Am. Dec. 575, note. The exceptions referred to relate to the necessity of a demand before suit may be maintained or the statute of limitations begins to run. The cases so holding seem to rest on the theory that the transaction not alone creates a debt against the drawer of the certificate, but is also in the nature of a bailment—in contemplation of law a deposit, and not a loan—and hence that demand is essential before the holder is entitled to the return of his money: Payne v. Gardiner, 29 N. Y. 146 (divided court); Bellows Falls Bank v. Rutland Co. Bank, 40 Vt. 377; Brown v. McElroy, 52 Ind. 404; Munger v. Albany City Nat. Bank, 85 N. Y. 580; McGough v. Jamison, 107 Pa. St. 336; Schute v. Pacific Nat. Bank, 136 Mass. 487. The settled doctrine of this court, however, seems to be that, when a person deposits money in a bank in the usual course of business, he loans it to the bank, which becomes his debtor to the amount of deposit, and not his bailee therefor: Lowry v. Polk County, 51 Iowa, 50, 33 Am. Rep. 114, 49 N. W. 1049; Long v. Emsley, 57 Iowa, 11, 10 N. W. 280. See cases collected in 3 Am. & Eng. Ency. of Law, 826. The title to the money passes to the bank, and becomes subject to its absolute control. The depositor cannot lay claim to the specific money, nor can he maintain an action in replevin <sup>14</sup> or trover therefor. His sole remedy is assumpsit. A promissory note payable on demand is due presently, and the statute of limitations begins to run from its date: See note to Merritt v. Todd, 80 Am. Dec. 243.

Why a different rule should be applied to a contract held to be an exact equivalent of such a note we are unable to discover. Certificates of deposit in the usual form are no more nor less than promissory notes by the banks issuing them, and, if there is any valid reason for declaring the one due at its date and the other only on demand, this has not been disclosed by the very eminent courts making such a distinction. The reasoning of Payne v. Gardiner, 29 N. Y. 146, is quite as persuasive when

applied to a demand note. There appears to be no tenable ground for not applying the rule pertaining to promissory notes payable on demand, and holding that the statute of limitations commenced to run at the date of this certificate: *Curran v. Witter*, 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 705; *Mitchell v. Easton*, 37 Minn. 335, 33 N. W. 910; *Tripp v. Curtenius*, 36 Mich. 494, 24 Am. Rep. 610; *Brummagin v. Tallant*, 29 Cal. 504, 89 Am. Dec. 61; *Lynch v. Goldsmith*, 64 Ga. 42; *Hunt v. Divine*, 37 Ill. 137. See *First Nat. Bank of Rapid City v. Security Nat. Bank of Sioux City*, 34 Neb. 71, 33 Am. St. Rep. 618, 51 N. W. 305.

2. It is the settled doctrine of this state that, where a party against whom a cause of action has accrued in favor of another by actual fraudulent concealment prevents such other from obtaining knowledge thereof, the statute of limitations will begin to run from the time the right of action is discovered, or, by the exercise of ordinary diligence, might have been discovered: *District Tp. v. French*, 40 Iowa, 601; *Findley v. Stewart*, 46 Iowa, 655; *Bradford v. McCormick*, 71 Iowa, 129, 32 N. W. 93; *Wilder v. Secor*, 72 Iowa, 161, 2 Am. St. Rep. 236, 33 N. W. 448; *Carrier v. Chicago etc. Ry. Co.*, 79 Iowa, 80, 44 N. W. 203. See note to *Shellenberger v. Ransom*, 31 Neb. 61, 28 Am. St. Rep. 500, 47 N. W. 700. As we have seen, the action accrued at <sup>15</sup> the time the money was deposited, October 12, 1881, and, as no fraud against deceased is charged, the statute commenced to run at that time. It was not interrupted by his death: *Grether v. Clark*, 75 Iowa, 383, 9 Am. St. Rep. 491, 39 N. W. 655; *Murphy v. Chicago etc. Ry. Co.*, 80 Iowa, 26, 45 N. W. 392. And, generally, the statute may not be suspended after beginning to run: *Black v. Ross*, 110 Iowa, 112, 81 N. W. 229. There are exceptions to this rule, as when no opportunity is afforded to resort to the courts, as in case of war: *Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. Rep. 530; or absence from the state: Code, sec. 345. But we have discovered no case holding that deception by the party liable will toll the statute. Here what is alleged to have been said and written amounted to no more than a denial of liability, and that evidence thereof existed in the books of the bank. The deceased must have known otherwise, and plaintiff acquired the right of action as his representative within eight years after it had accrued. Surely, under such circumstances, the claim of the reputed debtor, though knowingly false, that he owed nothing, and had no evidence to the contrary, furnished no

reason or excuse to the creditor for not instituting suit within the statutory period.

Affirmed.

Granger, C. J., not sitting.

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Limitations of Actions Against Certificates of deposits are discussed in the monographic note to *Hillsinger v. Georgia R. R. Bank*, 75 Am. St. Rep. 50.

Limitations of Actions.—Fraud as affecting the running of the statute of limitations is discussed in the monographic note to *Snodgrass v. Branch Bank*, 60 Am. Dec. 511-515.

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### CROSSLEY v. STANLEY.

[112 Iowa, 24, 83 N. W. 806.]

**SURETYSHIP—BREACH OF CONDITION—RELEASE OF SURETY.**—A surety may stipulate for the particular use of a note as a condition to signing it. This condition may be either material or immaterial, but no person who takes it with knowledge can acquire title as against him in violation of the terms imposed. The surety may insist on the strict terms of his agreement, and, if material alteration is made without his consent, notwithstanding it inures to his benefit, he is discharged.

**SURETYSHIP—BREACH OF CONDITION—RELEASE OF SURETY.**—If a surety is induced to sign a note by representations of his principal, known to the payee, that the proceeds of the note are to be applied to a certain purpose, the application of part of such proceeds to another and entirely different purpose, releases the surety.

Gilchrist, Whipple & Montgomery, for the appellant.

Nichols & Kirkland, for the appellees.

**25 LADD, J.** The deceased, John B. Reeve, conducted a private bank at Garrison. F. F. Hughes was a dealer in grain at the same place. About February 16, 1897, the latter had overdrawn his account at the bank \$1,159.58, and owed Reeve besides \$2,000 on book accounts, and \$1,000 secured by a mortgage on his homestead. Hughes had also received wheat from farmers for which he had agreed to pay the market price on demand, then valued at \$2,000. He had no money to pay for the stored wheat, and apprehended the necessity of closing his business in event the farmers called on him for its value. In this situation he arranged to execute to Reeve a note for \$2,500, with eight sureties, one of whom was Reeve, which was done.



The proceeds of this note were credited to Hughes on the books of the bank in payment of the overdraft, and the balance, save \$98.32, used in his business. There is no question but that Hughes concealed the existence of the overdraft from the plaintiffs, and induced them to sign as sureties upon the representation that the money was to be used in payment for the stored wheat, and what was left—from \$500 to \$800—to carry on his business. True, as contended by appellant, the money was borrowed to enable him to continue in business, but the manner of such continuance was to be as stated; and Reeve knew of the purpose for which the money <sup>26</sup> was intended, and of the representations through which the signatures of the sureties were procured. To these matters Hughes testified without objection being made to his competency: *Burdick v. Raymond*, 107 Iowa, 228, 77 N. W. 833.

1. That a surety may stipulate for the particular use of a note as a condition to signing it is settled by the decisions. This condition may be material or immaterial, and no person who takes it with knowledge can acquire title as against him in violation of the terms imposed. The surety may insist on the strict terms of his agreement, and, if material alteration is made without his consent, notwithstanding it inure to his benefit, he will be discharged: *Stillman v. Wickham*, 106 Iowa, 597, 76 N. W. 1008. As said by Earle, J., in *Benjamin v. Rogers*, 126 N. Y. 60, 26 N. E. 970: "A surety has the right always to impose any limit he chooses to his liability. He may always fix the precise terms upon which he is willing to become a surety, no matter whether the terms seem to be material or immaterial. By imposing them, he makes them material, and one who takes his contract with knowledge of the limitations cannot enforce it against him. The general rule as to a surety is that he is not to be bound beyond the plain terms of his contract, and it is not sufficient to make him liable that he may sustain no injury by a change in the contract." As directly in point, see *Altoona Second Nat. Bank v. Dunn*, 151 Pa. St. 228, 31 Am. St. Rep. 742, 25 Atl. 80; *Johnson v. May*, 76 Ind. 293; *United States Nat. Bank v. Ewing*, 131 N. Y. 506, 27 Am. St. Rep. 615, 30 N. E. 501; *Clinton Bank v. Ayres*, 16 Ohio, 283. In *Gage v. Sharp*, 24 Iowa, 15, and *Laub v. Rudd*, 37 Iowa, 619, the holders were held to have taken without notice. But, aside from this, it is manifest that the sureties had an interest in the use of the money as proposed. The stored wheat, if paid for, would have become an asset out of

which the note might in the future be paid, while nothing could be anticipated from the satisfaction of the overdraft. Again, had the money been devoted to the purposes intended, Hughes would not have been left empty-handed at the time of Reeve's <sup>27</sup> death, in June of that year, but would have had funds with which to carry on his business, as was intended, and the opportunity to acquire means from which to satisfy the note. These sureties had the undoubted right to stipulate for the application of the proceeds of the note to the purposes intended. The representations of Hughes, with their response by signing in reliance thereon, amounted to such an agreement. As Reeve had full knowledge of all this, he took the note thus limited, and by diverting a part of the proceeds to another purpose—i. e., the payment of the overdraft, without their consent—released them from liability.

**Affirmed.**

Granger, C. J., not sitting.

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**A Surety may Insist that He Cannot be Bound except upon his own terms:** Grasser etc. Brewing Co. v. Rogers, 112 Mich. 112, 67 Am. St. Rep. 389, 70 N. W. 445. He is entitled to stand upon the strict terms of his contract, and if the contract is altered without his consent, although he sustains no injury thereby, the contract ceases to be his, and with that ceases his obligation: Note to First Nat. Bank v. Gerke, 6 Am. St. Rep. 458. If one becomes a surety on a contract to enable his principal to raise money with which to operate a business, he is released from liability, if the person furnishing the money has knowledge of the purposes of the contract, and without the knowledge of the surety, and without intentional fraud, applies a portion of the money thus raised to the payment of a pre-existing debt: Gano v. Farmers' Bank, 103 Ky. 508, 82 Am. St. Rep. 596, 45 S. W. 519.

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## SCHMIDT v. NORTHERN LIFE ASSOCIATION.

[112 Iowa, 41, 83 N. W. 800.]

**INSURANCE, LIFE—EFFECT OF KILLING OF ASSURED BY BENEFICIARY.**—A beneficiary in a life insurance policy payable to him, his heirs, or legal representatives, who murders the insured, forfeits his rights under the policy, and neither he, his assignee, nor his children as heirs can recover thereon during his lifetime.

**INSURANCE—LIFE—PROPERTY RIGHTS OF BENEFICIARY.**—A beneficiary in a benefit certificate of life insurance has no vested interest or property right therein during the life of the

assured, as he retains the right of appointment and of changing the beneficiary.

**INSURANCE, LIFE—KILLING OF ASSURED BY BENEFICIARY—RIGHT OF ADMINISTRATOR TO RECOVER.**—If the beneficiary in a life insurance policy kills the insured, he cannot recover from the insurance company, but the insurance money forms a part of the estate of the insured and may be recovered by his administrator, as if no beneficiary had been designated.

Davison & Lane and Carney & Holt, for the appellant.

Ely & Bush and H. Vollmer, for the appellee.

**42** **DEEMER, J.** The defendant is a mutual benefit society organized under the laws of this state. On the tenth day of July, 1897, it issued a certificate of insurance on the life of Claus Behrens, payable to Christina Maria Behrens, her heirs or legal representatives, under which the beneficiary was entitled to share in the funds of the association to the amount of two thousand dollars. After the issuance of the certificate the beneficiary caused the death of the insured (her husband), by administering to him a lethal dose of poison: See *State v. Behrens*, 109 Iowa, 58, 79 N. W. 387. Notice and seasonable proofs of the death of the insured were made to the association; but, as it failed to pay the amount promised in its certificate, plaintiff, as the administrator of the estate of Claus Behrens, deceased, commenced this action, claiming that, as the beneficiary took the life of the assured, she could not recover, and that she held the legal title to the proceeds of the certificate in trust for the benefit of the estate of deceased. Henry Vollmer, who received an assignment of the certificate from the beneficiary after the death of the insured, intervened in the action, and asked that the amount due on the certificate be paid to him. Defendant answered this petition, pleading the facts above recited as a defense to his (intervenor's) claim, and made a motion for judgment on the pleadings. This motion was sustained, and Vollmer also appeals. Christina Behrens, the beneficiary, has two children—Hulda Bendt and Paula Behrens. The former also filed a petition of intervention, in which she made claim to one-fourth of the <sup>43</sup> proceeds of the certificate (one-half of her interest having been assigned to Henry Vollmer), as an heir of the beneficiary named in the certificate. To this the defendant demurred, and its demurrer was sustained. From that ruling Hulda Bendt appeals. In his reply to the answer to his petition of intervention, Vollmer set forth the assignment made to him by Hulda Bendt, and asked judgment thereon for one-fourth the amount of the pro-



ceeds of the certificate. The motion filed by defendant for judgment on the pleadings, tendering the issues between Vollmer and the defendant, was grounded, among other things, on the proposition that his claim to one-fourth of the proceeds in virtue of the assignment from Hulda Bendt was not properly pleadable in a reply.

Aside from the issues tendered by the petitions of intervention, the question presented may be stated in this wise: Where a certificate in a mutual benefit society is made payable to a third party, as beneficiary, who afterward feloniously causes the death of the insured, can the administrator of the insured recover the benefits provided in the certificate? Before going to that question, it is well to consider the intervenor's appeals. The certificate provides that on satisfactory proof of death, and it appearing that the member was in good standing and had complied with the conditions of the policy, the association agreed that Christina Behrens, her heirs or legal representatives, should be entitled to share in the beneficiary fund to the extent of two thousand dollars. The certificate was made nonassignable except by consent of defendant's board of directors. It is clear that until the death of the beneficiary her heirs have no claims, as such, against the defendant. The amount is payable to Christina Behrens, her heirs or legal representatives. So long as she is alive she has no heirs, and her children have no claim to the insurance simply because she caused the death of the insured, and thus forfeited her <sup>44</sup> right to take under the certificate. Civil death, growing out of a sentence of imprisonment for life, is not generally recognized in this country: *Avery v. Everett*, 110 N. Y. 317, 6 Am. St. Rep. 368, 18 N. E. 148; *Baltimore v. Chester*, 53 Vt. 315, 38 Am. Rep. 677; *Frazer v. Fulcher*, 17 Ohio, 260; *Platner v. Sherwood*, 6 Johns. Ch. 118; *Cannon v. Windsor*, 1 Houst. 143; *Dade Coal Co. v. Haslett*, 83 Ga. 549, 10 S. E. 435; *Kenyon v. Saunders*, 18 R. I. 590, 30 Atl. 470; *Willingham v. King*, 23 Fla. 478, 2 South. 851; *Davis v. Laning*, 85 Tex. 39, 34 Am. St. Rep. 784, 19 S. W. 846. The children of the beneficiary had no right of action against the defendant, and, having no right, there was nothing for them to assign to another. If the beneficiary named in the certificate cannot recover, because of her act in taking the life of the insured, her assignee, who simply stands in her shoes, cannot. That Christina Behrens, who took the life of the insured, cannot recover on the policy, is conceded. It would be a reproach to our

system of jurisprudence if one could recover insurance money payable on the death of the insured, whose life he had feloniously taken. Certainly, one who sets fire to his own building cannot recover the insurance thereon, and we know of no reason why the maxim, "Nullus commodum capere potest de injuria sua propria," should not apply. Indeed, the unbroken voice of authority is to the effect that a beneficiary in an insurance policy who murders the insured forfeits his rights thereunder: *New York etc. Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. Rep. 877; *Prince of Wales etc. Assn. Co. v. Palmer*, 25 Beav. 605; *Schreiner v. High Court*, 35 Ill. App. 576. See, also, as somewhat in point, *Moore v. Woolsey*, 4 El. & B. 243; *Names v. Dwellinghouse Ins. Co.*, 95 Iowa, 642, 64 N. W. 648; *Society v. Bolland*, 4 Bligh, N. S., 194; *Western Horse etc. Ins. Co. v. O'Neill*, 21 Neb. 548, 32 N. W. 581; *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. Rep. 302; *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550, 21 Am. Rep. 541. The only exception to this wholesome rule seems to be found in cases relating to the descent of property, where the statutes make no exceptions, as in *Shellenberger v. Ransom*, 41 Neb. 631, 59 N. W. 935; *In re Carpenter's Estate*, 170 Pa. St. 203, 50 Am. St. Rep. 765, 32 Atl. 637; *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794. But see, in this same connection, *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819, 22 N. E. 188. We are of opinion that the maxim cited applies to the case at bar, that contracts must be made and interpreted in the light of public policy, and that it is contrary to the good order of society, and an encouragement to crime, to allow a beneficiary who murders the assured to receive the benefits of the insurance. Any other rule would furnish the strongest temptation to crime, and give to the party interested the most potent incentive to bring about the death of the insured, that he might profit thereby. The public has an interest in such matters over and beyond the individuals or societies involved, and courts are not bound to enforce or hold valid any contract which offends public morals, violates the law, or contravenes public policy. Had the certificate contained a provision to the effect that benefits would be paid in the event the beneficiary took the life of the insured, it would clearly be opposed to public policy, and would not be enforced. If recovery were permitted by the beneficiary or her assignee in this action, it would be giving the same effect to the certificate as

if such a clause was included in the contract. Neither of the intervenors, Bendt or Vollmer, is entitled to recover.

2. We come now to the case made by the administrator, and the more important and controlling question hitherto stated. Public policy, as we have seen, forbids an action on behalf of the beneficiary or her assignee. But what becomes of the benefit promised to be paid on the death of the assured? Is the company absolved from all liability because of the murder of the assured, or <sup>46</sup> must it pay the amount promised to some one, and, if so, to whom? Neither the beneficiary nor her children, nor her assignee can recover, because of the wrong perpetrated by her; but does her wrong absolve the association from its liability? We think not. There is no provision in the certificate that it should be forfeited in the event the insured was murdered, and no condition of any kind against murder. The agreement was to the effect that in case of the death of the assured the beneficiary should be entitled to a share in the beneficiary fund to the amount of two thousand dollars. The application, which was made a part of the certificate, contained this statement: "I direct that all benefits to which I may be entitled from the association be paid to Christina Behrens, related to me as my wife, subject to such future disposal of benefits as I may hereafter direct." It is also provided that the certificate, if issued, should designate as beneficiary either one of the insured's family or relatives, or his legal representatives, heirs, or legatees. This was in accordance with the statute in force at the time, which provided that "no corporation or association organized or operating under this act shall issue any certificate of membership, or policy, unless the beneficiary under said certificate shall be the husband, wife, relative, or legal representative, heir or legatee of such insured member": Acts Twenty-first General Assembly, c. 65, sec. 7. The object of such insurance is to provide a benefit for the persons named. In ordinary life insurance contracts, the assured has no property in the policy. The contract is between the company or association, on the one part, and the beneficiary, on the other, and from the day of its issue it is the property of the beneficiary. By the decided weight of authority, however, the beneficiary named in a certificate issued by a mutual benefit society has no property therein. All that he has during the lifetime of the assured is a mere expectancy, dependent on the will and act of the member. <sup>47</sup> After the death of the member the beneficiary has a property interest, but not before: Masonic etc.



Soc. v. Burkhart, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; Brown v. Grand Lodge, 80 Iowa, 287, 20 Am. St. Rep. 420, 45 N. W. 884; Hirschl v. Clark, 81 Iowa, 200, 47 N. W. 78. Certificates of insurance in mutual benefit societies are contracts between the society and the member whose life is insured. During the life of the assured he has the power of appointment, or the right to designate to whom the benefits shall be paid. It has been held that, if he designates one outside the class prescribed by the statute this does not render the policy void, but the insurance in such case becomes payable to those who would have been entitled to it in the absence of any designation: Shea v. Massachusetts etc. Assn., 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855; Rindge v. New England etc. Soc., 146 Mass. 286, 15 N. E. 628; Burns v. Grand Lodge, 153 Mass. 173, 26 N. E. 443; Keener v. Grand Lodge, 38 Mo. App. 543; Palmer v. Welch, 132 Ill. 141, 23 N. E. 412; Britton v. Supreme Council, 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675. The naming of a beneficiary, though not a bequest, partakes of its nature: Phillips v. Carpenter, 79 Iowa, 600, 44 N. W. 898; Robinson v. Duvall, 79 Ky. 83, 42 Am. Rep. 208. In Rindge v. New England etc. Soc., 146 Mass. 286, 15 N. E. 628, it is expressly held that where the assured makes a designation of beneficiary, unlawful because of statutory inhibition, the administrator of his estate is entitled to recover on the certificate for the benefit of the persons who would have been entitled to the insurance in the absence of any designation; and in Ryan v. Rothweiler, 50 Ohio St. 595, 35 N. E. 681, the beneficiary died before the death of the assured, and it was held that the fund lapsed into the estate of the person who created the trust, and at his death became a part of his estate. The court followed the trust-fund doctrine, and said, among other things: "The question is not governed so much by the principle of choses in action and vested rights as by the principles, aims, and well-known objects of life insurance. The cases which hold the <sup>48</sup> insurance money to be a trust fund which reverts to the estate of the assured in case of the death of all the named beneficiaries during the lifetime of the assured give different reasons for the results arrived at. Some place it upon the ground that the person to whom the fund would otherwise revert has no insurable interest in the life of the assured, while others place it upon the doctrine of failure of trust by the death of the beneficiary. In the case now under consideration, should the plaintiff in error [administrator of one of the de-

ceased beneficiaries] succeed, he would recover the insurance money, while he manifestly had no insurable interest in the life of Mr. Helwig. The theory of a failure of trust comes with more force and stronger reasons than the doctrine of choses in action, so strongly argued by counsel for plaintiff in error. We regard the doctrine of choses in action as not fully applicable, because it conflicts in many cases with the controlling doctrine of insurable interest. Upon principle, therefore, and aside from any statute on the subject, we think that in this case the policy reverted to Mr. Helwig [the assured], and at his death became a part of his estate. It seems to us that this was the manifest intention and understanding of all the parties interested, and that the result is just and equitable. While there may have been a vested interest, it was an interest not in possession, but in expectancy, liable to be diverted from the insured before the death of the assured. We therefore hold, both upon principle and a construction of the statute, that upon the death of the wife and daughter the property reverted to Mr. Helwig [the assured], and at his death became a part of his estate." In *Bancroft v. Russell*, 157 Mass. 47, 31 N. E. 710, the insurance was payable to a trustee, for the benefit of the wife of the assured. The wife died before the husband, who was the assured, and it was held that there was a resulting trust in favor of the assured's estate: See, also, *Haskins v. Kendall*, 158 Mass. 224, 35 Am. St. Rep. 490, 33 N. E. 495. Commenting on this <sup>49</sup> last case, Mr. Bacon, in his work on *Benefit Societies*, second edition, paragraph 243a, says: "Conceding the rule to be that if the person designated as beneficiary die in the lifetime of the member, a lapse of the designation results, it has been held that under the rules of the society the benefit generally will not revert to the society, but a resulting trust accrues for the benefit of either those designated by the laws of the association to receive in case of failure of designation, or for those entitled to take as heirs of the member under the statutes of distribution." We are not entirely without precedent in our own cases. In *Newman v. Covenant Mut. Ins. Assn.*, 76 Iowa, 61, 14 Am. St. Rep. 196, 40 N. W. 87, the certificate was to be made payable to devisees named in the will of the assured. He failed to make the designation, and his administrator brought suit against the society. We held that the company was not released, and said: "Surely the defendant ought not to seek to avoid its obligation by the alleged failure of beneficiaries. If he made no last will and testament, the right to the avails of

the life insurance would descend to his heirs, the same as any other property or chose in action." Defendant obligated itself to pay on the death of the assured, and it ought not to be held that the act of the beneficiary forfeited all claim under the policy. The wife cannot recover because it is contrary to public policy to allow her to enforce the claim. But this rule of public policy ought not to be extended so as to defeat all claims on the policy. We have seen that when there has been no designation, or an illegal designation, or a designation of a person as beneficiary who dies before the death of the assured, the association holds the money in trust for the benefit of the estate of the assured. Following this doctrine to its logical conclusion, it seems to us that, when the beneficiary named is prohibited from taking because of her own wrong, a trust arises that will be enforced in a proper case. This trust is created in favor of the <sup>50</sup> husband's estate, and takes effect by reason of the crime of the wife, which destroys the trust in her favor. In so far as she is concerned, the trust is destroyed by her crime, and in consequence a resulting trust in favor of the husband's estate is allowed. If we treat the designation of a beneficiary as akin to a bequest, the same result follows; for a lapsed legacy descends to the heirs of the testator. Moreover, the fund was created or collected by the defendant for the benefit of the persons or classes named in the statute. True, it is to pay this fund to such person or persons of this class as may be designated by the assured; but, if no one is selected, it is nevertheless a trust fund to be paid to the estate of the assured, for the benefit of one of the classes or persons named. No one will doubt the proposition that whenever property is produced by payments made by one, that are to be held in trust for another, and that trust fails or is satisfied, a resulting trust arises in favor of the party making the payments, or his estate. The celebrated case of *Cleaver v. Mutual Reserve Fund Life Assn.* (1892), 1 Q. B. Div. 147, growing out of the *Maybrick* case, is much like the one at bar; and it was there held that notwithstanding Mrs. Maybrick, who murdered her husband, was named as beneficiary in his certificate of insurance and could not recover from the insurance company, still the insurance money formed a part of her husband's estate, and could be recovered by his administrator. That decision meets with our approval, and we have no hesitation in following it: See, also, *In re Conrad's Estate*, 89 Iowa, 399, 48 Am. St. Rep. 396, 56 N. W. 535, wherein it was held, in a case where the beneficiary died before the assured, that the fund



should be disposed of according to the laws of descent. When Mrs. Behrens caused the death of her husband, all her rights under the policy ceased, and the trust in her favor was by that act annulled, but the obligation of the company to pay the promised benefit was not canceled. Absolution from payment to Mrs. Behrens was brought about by her own conduct, which prevented her from recovering because of public policy. But the interest <sup>51</sup> in the benefits to which the assured was entitled from the association was not destroyed. We have no occasion to determine whether or not Mrs. Behrens can take anything through the administrator, as that question is not before us. It will be time enough to consider it when it is properly presented. None of the cases relied on by appellant are in point. The question here decided was not raised in *Schoep v. Bankers' etc. Ins. Co.*, 104 Iowa, 354, 73 N. W. 825. *McClure v. Johnson*, 56 Iowa, 620, 10 N. W. 217, involved no such question as is here presented. Ordinarily, the proceeds of a policy of insurance payable to another than the assured do not constitute assets of his estate, and cannot be disposed of by will.

The judgment of the district court is correct, and it is affirmed.

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**Insurance.**—The beneficiary under a benefit certificate of a benevolent association usually has no vested interest until the death of the member: *Independent Foresters v. Keliher*, 36 Or. 501, 78 Am. St. Rep. 785, 59 Pac. 324, 1109, 60 Pac. 563. Compare *Jackson Bank v. Williams*, 77 Miss. 398, 78 Am. St. Rep. 530, 26 South. 965.

**Insurance.**—The killing of the assured by an insane beneficiary, under such circumstances as would make the killing murder if the beneficiary were sane, does not forfeit his right to the insurance money: *Holdom v. Ancient Order of United Workmen*, 159 Ill. 619, 60 Am. St. Rep. 183, 43 N. E. 772.

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## LIPPOLD v. LIPPOLD.

[112 Iowa, 134, 83 N. W. 809.]

**APPELLATE PRACTICE—NOTICE OF APPEAL—PARTITION.**—In partition suits where there are several parties plaintiff or defendant and one of these appeals, notice of the appeal must be served on all the other parties interested, otherwise the supreme court cannot entertain the appeal.

**DEEDS—DELIVERY—RETENTION BY GRANTOR.**—If a grantor, with the assent of the grantee, delivers his deed to a third person to be delivered by him to the grantee upon the death of the grantor, and it is so delivered, it is effective to pass title, if it was the intention of the grantor that it should become operative at once, but postponing the time of enjoyment until his death, although he retains power to recall the instrument during his life.

Tonner & Cullison, for the appellants.

Benjamin & Preston, for the appellees.

**135** DEEMER, J. Other than those appearing in a representative capacity, the parties to this suit are the heirs at law of William Lippold, deceased, who had been the owner of, and until the time of his death occupied, the premises of which partition is prayed. Defendant George Lippold controverts the descent, and pleads title in himself by deed from William Lippold of date November 19, 1894. This defendant also pleads certain advancements made by the ancestor to the other heirs, and asks that these advancements be fixed and allowance made therefor in the event partition is granted. The delivery of the deed to George Lippold is denied, and this issue presents the real controversy in the case. The codefendants of George Lippold filed a disclaimer, and also stated in this disclaimer that they had quitclaimed their interest to George. The appellants did not serve notice of appeal on their coplaintiffs. Code, section 4111, provides: "A part of several coparties may appeal; but in such a case they must serve notice of the appeal upon all the other coparties and file proof thereof with the clerk of the supreme court." Under this section we have uniformly held that in partition suits, where there are several parties plaintiff or defendant, and one of these appeals, notice of appeal must be served on coparties: *Laprell v. Jarosh*, 83 Iowa, 753, 49 N. W. 1021; *Hunt v. Hawley*, 70 Iowa, 183, 30 N. W. 477; *Ash v. Ash*, 90 Iowa, 229, 57 N. W. 862. Failure to give the notice is not jurisdictional, however, and this court can consider such questions in the case as do not affect the rights or interests of the other parties. If we should reverse the judgment in this case, the effect would **136** be to hold that all the parties save those who had filed disclaimers are entitled to inherit a portion of the land. We would also be required to consider the question of advancements made to some of the parties. Manifestly, this would affect the rights of the other parties. We are the more ready to reach this conclusion for the reason that the decree of the district court on the main issue presented seems to be correct, and in accord with the previous holdings of this court in *Newton v. Bealer*, 41 Iowa, 334, *Hinson v. Bailey*, 73 Iowa, 544, 5 Am. St. Rep. 700, 35 N. W. 626, *Trask v. Trask*, 90 Iowa, 318, 48 Am. St. Rep. 446, 57 N. W. 841, *Denzler v. Rieckhoff*, 97 Iowa, 75, 66 N. W. 147, and other like cases. The deed was delivered by the grantor William Lippold, to the cash-

ier of a bank, with the knowledge and assent of George Lippold, the grantee, to be by him (the cashier) delivered to the grantee on the death of William. The evidence satisfactorily establishes an intent on the part of the grantor to make the deed operative as such, but postponing the time of enjoyment until his death. That such an instrument passes title is too well settled by our cases to require further discussion. It is true that the cashier who received the deed made a memorandum on the envelope in which it was placed to the effect that the deed was to be delivered to William Lippold, or in case of his death to George Lippold and George Deiderich; but the other evidence shows, without apparent conflict, that he executed the instrument with the intention of passing title to his son. True, he had power to recall the instrument during his life, but this he never exercised, and his death took away the power. As said in the Newton case, *supra*: "Where one who has the mental power to alter his intention, and the physical power to destroy a deed in his possession, dies without doing this, there is, it seems to us, but little reason for saying that his deed shall be inoperative, simply because during life he might have done that which he did not do. It is much more consonant with reason to determine the effect of the deed by the intention existing up to the time of death, than to refuse to give it that effect because <sup>137</sup> the intention might have been changed."

Dismissed and affirmed.

Granger, C. J., not sitting.

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**A Deed Placed in Escrow beyond the control of the grantor, to be delivered to the grantee upon the death of the grantor, is valid:** *Fulton v. Priddy*, 123 Mich. 298, 81 Am. St. Rep. 201, 82 N. W. 65. It is otherwise, however, if the grantor retains any control over the instrument: See the monographic note to *Brown v. Westerfield*, 53 Am. St. Rep. 554; *Williams v. Daubner*, 103 Wis. 521, 74 Am. St. Rep. 902, 79 N. W. 748.



## CHADWICK v. STOUT.

[112 Iowa, 167, 83 N. W. 901.]

**EXEMPTIONS—WAGES—EXTENSION OF STATUTORY PERIOD.**—Under a statute providing that the personal earnings of a debtor “at any time within ninety days next preceding the levy” shall be exempt from liability for his debts, the period of time during which litigation to recover such earnings may be pending, cannot be eliminated in the computation of such ninety days.

T. D. Hastie, for the appellants.

MacKenzie & Dewey, for the appellee.

**167** SHERWIN, J. Suit was brought in a justice court to recover for personal services rendered by the plaintiff therein, who was the head of a family, and entitled to the statutory exemptions. He there procured a judgment, from which an appeal was taken to the district court. Nearly four months after his original suit was brought he obtained judgment on his claim in the district court, and now claims that the proceeds thereof were exempt to him, under section 4011 of the code of 1897, at the time his final judgment <sup>168</sup> was obtained, and at the time the levy thereon was made. The statute in question provides that the personal earnings of the debtor “at any time within ninety days next preceding the levy” shall be exempt from liability for his debts, and we are asked to construe it so as to eliminate the time during which suit for the recovery of such earnings may be pending. No one questions the rule that exemption laws should be given a liberal construction in favor of the debtor’s family, but the language of the statute under consideration is plain and unambiguous, and in express terms places the limit at ninety days next preceding the levy. Nothing can be gathered therefrom indicating an intent to remove from the computation of this time the period during which litigation to recover such earnings may be pending. The protection afforded the family by the time specified was evidently deemed sufficient by the lawmakers, and we cannot extend it to cover contingencies which were as well known to them as to the courts, without doing extreme violence to all rules of construction. The question before us was not in the case of *Millington v. Laurer*, 89 Iowa, 322, 48 Am. St. Rep. 385, 56 N. W. 533; nor do we think the language of the opinion therein supports the appellants’ contention. The

district court gave the proper construction to the statute, and the judgment is affirmed.

Granger, C. J., not sitting.

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On Exemption of Wages, see the monographic note to *Brown v. Hebard*, 91 Am. Dec. 411-425. Exemption statutes are designed to secure to laborers and their families the small fruits of their toil, and must be given such proper and liberal interpretation\* as will give them full force and effect: *Rustad v. Bishop*, 80 Minn. 497, 81 Am. St. Rep. 282, 83 N. W. 449.

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## GERMAN SAVINGS BANK v. DRAKE ROOFING CO.

[112 Iowa, 184, 83 N. W. 960.]

**GUARANTY—NOTICE TO GUARANTOR.**—When a guaranty is an effort to become responsible for a credit that may or may not be given to another, at the option of the party to whom the application for credit is made, the guarantor must within a reasonable time, be notified of the acceptance of the guaranty.

**GUARANTY—OFFER OF—NOTICE OF ACCEPTANCE.**—An instrument by which guarantors promise to pay to a certain bank all indebtedness of a third person, not exceeding a certain amount that may accrue within a certain time waiving demand, notice and protest on the part of the bank in collecting, not founded on any consideration except future advances to be made, and not signed at the bank's request or in its presence, is a mere offer of guaranty requiring notice of acceptance by the bank to bind the guarantors.

**GUARANTY—NOTICE TO GUARANTOR.—INSOLVENCY OF THE PRINCIPAL DEBTOR** at the time a guaranty is made to secure future advances to him for a limited time and the continuance of such insolvency, are sufficient excuse for not giving notice to the guarantors of the advances made, or of the state of the account at the expiration of the guaranty.

**GUARANTY.—DEMAND AND NOTICE OF NONPAYMENT** by the principal debtor are not essential to a recovery against his guarantor.

Phillips, Ryan & Ryan, for the appellants.

W. G. Harvison, for the appellee.

185 **DEEMER, J.** The Drake Roofing Company was engaged in the business of gravel roofing in the city of Des Moines. Prior to October 2, 1895, it had been doing business with plaintiff, a banking corporation in the same city. Wishing to branch out in its business, the roofing company, through its secretary, J. F. N. Drake, applied to the bank for further accommodations, by way of loans, to enable it to buy materials

in larger quantities and at better rates. The secretary did not wish to furnish securities every time he called for a loan, and a guaranty was agreed upon. The attorney for the bank prepared the instrument, which was as follows, to wit: "For the purpose of inducing the German Savings Bank, of Des Moines, Polk county, Iowa, to extend credit to the Drake Roofing Company, the undersigned J. F. N. Drake, F. O. Drake, A. P. Cottrell and R. T. C. Lord, hereby guarantee to the said German Savings Bank payment of all notes, checks, drafts, overdrafts, and other evidences of indebtedness which may accrue from the said Drake Roofing Company to the said German Savings Bank within six months from the date of this guaranty, not to exceed the sum of five hundred dollars, it being the intention of this contract to secure payment to the said German Savings Bank; and the undersigned hereby agree to pay to the said German Savings Bank all notes, checks, drafts, overdrafts, and other evidences of indebtedness from said Drake Roofing Company to said German Savings Bank which may accrue within six months from the date hereof, not to exceed five hundred dollars, waiving demand, notice, and protest on the part of the said German Savings Bank in collecting <sup>186</sup> said sums from said Drake Roofing Company." The secretary took this to the defendants, who signed it, and he (secretary) returned the same to the bank. A few days after the delivery of the instrument, the roofing company was allowed to overdraw its account to the extent of five hundred and nine dollars. Thereafter, and about the time the bank's quarterly statement was due, it requested the roofing company to make a note for five hundred dollars, to cover that amount of the overdraft. The request was granted, and on the fifth day of November, 1895, the roofing company, through its secretary, executed and delivered a demand note for the sum of five hundred dollars, payable to the bank. This note was renewed on February 10, 1896, and again on April 1, 1896—each time by a demand note bearing eight per cent interest, and providing for attorneys' fees. No notice of the acceptance of the guaranty, or of advances made thereon, was ever given the defendants. At the time of the transactions in question the Drake Roofing Company was insolvent, and, as it failed to pay the last renewal note, this action was brought on that note, and the instrument of guaranty hitherto set out. The defenses have already been stated, and as they are each and all relied on, they will be considered in the order in which they were set out.



When defendants signed the letter of guaranty, the Drake Roofing Company was not indebted to the plaintiff. The advancements were made by the bank after the delivery of the instrument of guaranty, and the primary question is, Was notice of the acceptance of the guaranty necessary? The authorities relating to this question are in hopeless conflict, and, although some of the rules are fairly well settled, there is a want of harmony in the decisions applying them to special circumstances. When the guaranty is a letter of credit, or an effort to become responsible for a credit that may or may not be given to another, at the option of the party to whom the application for credit is made, the decided weight of authority is <sup>187</sup> that the guarantor must within a reasonable time be notified of the acceptance of the guaranty. But they differ more or less in determining what is a guaranty and what an offer to guarantee. Two very satisfactory and conclusive reasons are given for this general rule. The first is that the so-called guaranty is a mere offer or proposition, and is not complete until the party making the offer is notified of its acceptance, when the minds of the parties meet, and the contract is completed. The second is that the party making the offer is entitled to know whether or not his offer has been accepted, that he may know his responsibility, and so regulate his course of conduct toward the principal debtor that he may not suffer loss: See, as supporting the rule, *Edmondston v. Drake*, 5 Pet. 113; *Douglass v. Reynolds*, 7 Pet. 113; *Lee v. Dick*, 10 Pet. 482; *Adams v. Jones*, 12 Pet. 207; *Davis v. Wells*, 104 U. S. 159; *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524, 6 Sup. Ct. Rep. 173; *Clafin v. Briant*, 58 Ga. 414; *Taylor v. McClung*, 2 Houst. 24; *Tuckerman v. French*, 7 Greenl. 115; *Kellogg v. Stockton*, 29 Pa. St. 460; *Kincheloe v. Holmes*, 7 B. Mon. 5, 45 Am. Dec. 41; *Allen v. Pike*, 3 Cush. 238; *Mussey v. Rayner*, 22 Pick. 223; *Rankin v. Childs*, 9 Mo. 673; *Mayfield v. Wheeler*, 37 Tex. 256; *McCollum v. Cushing*, 22 Ark. 540; *Geiger v. Clark*, 13 Cal. 579; *Cooke v. Orne*, 37 Ill. 186; *Oaks v. Weller*, 13 Vt. 106, 37 Am. Dec. 583; *Steadman v. Guthrie*, 4 Met. (Ky.) 147; *Kay v. Allen*, 9 Pa. St. 320; *Beebe v. Dudley*, 26 N. H. 249, 59 Am. Dec. 341. In *Douglass v. Howland*, 24 Wend. 35, Justice Cowen wrote an elaborate opinion entirely repudiating the doctrine of notice as necessary to the consummation of the contract; but that case has not been generally followed, and has been doubted, if not overruled, by *Jackson v. Griswold*, 4 Hill, 522. See, also, *Beekman v. Hale*, 17 Johns. 140. There are a few cases which seem

to hold a guaranty relating to future advances binding although no notice of acceptance is <sup>188</sup> given the guarantor. These decisions are opposed to the great weight of authority, and we are not inclined to follow them: See *Whitney v. Groot*, 24 Wend. 82; *Wright v. Griffith*, 121 Ind. 478, 23 N. E. 281; *Union Bank v. Coster*, 3 N. Y. 203, 53 Am. Dec. 280; *Lonsdale v. Lafayette Bank*, 18 Ohio, 126; *Yancey v. Brown*, 3 Sneed, 89. But even here the conflict is more in the application of principles to particular facts than in the principles themselves. The difficulty seems to be in distinguishing between an absolute guaranty and a mere offer to, or proposal of, guaranty. In some cases it is held that notice of acceptance must be given the guarantor even though his promise be absolute in terms. Chief Justice Marshall so held in *Russell v. Clarke*, 7 Cranch, 69. Judge Story appears to have been of the same opinion: See *Cremer v. Higginson*, 1 Mason, 323, Fed. Cas. No. 3383. See, also, *Allen v. Pike*, 3 Cush. 238; *Talbot v. Gay*, 18 Pick. 534; *Craft v. Isham*, 13 Conn. 28. But New York and some other states hold to the contrary: See cases already cited. But here, again, the conflict seems to be founded primarily on the construction of the contract, and on the divergent views as to what constitutes an absolute guaranty. Conceding for the purposes of the case that no notice of acceptance of an absolute guaranty is required, and holding, as we do, that a mere offer or proposal of guaranty requires notice of acceptance by the other party, we are to determine to which class the instrument in suit belongs. The best statement of the rule we have been able to find is that announced in *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524, 6 Sup. Ct. Rep. 173, where Gray, J., speaking for the court, says: "A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, <sup>189</sup> the mutual assent is proved, and the delivery of the guaranty to him, or for his use, completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them, except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance

by the other party to complete the contract": See, also, *De Cremer v. Anderson*, 113 Mich. 578, 71 N. W. 1090. The case at bar clearly belongs to the latter class stated by Justice Gray. There is no evidence of any request from plaintiff to defendant guarantors, or of any consideration moving from it, and received or acknowledged by them at the time they signed the guaranty, or that credit was extended the Drake Roofing Company at the time the letter of guaranty was delivered. Indeed, it clearly appears that the guaranty was not signed at the request of plaintiff. It was not present, either by agent or otherwise, at the time the instrument was executed; and there was no consideration for the guaranty, except in the future advances to be made to the roofing company. Plaintiff did not know who was to sign the guaranty until it was delivered, and even after delivery it was not bound to extend credit to the roofing company. We are of opinion that the instrument was in legal effect a mere offer of guaranty, requiring notice of acceptance to bind the guarantors. It is conceded by all parties that the guaranty is a collateral, and not an original, promise. Hence we have no occasion to determine any other question than that already decided. If the guaranty should be construed to be an original promise on the part of the defendants to pay for any goods that might be furnished to the Drake Roofing Company, or to pay any advances that might be made to it, perhaps the delivery of the goods or the furnishing of the money might complete the contract, under the rule announced in *Bishop on Contracts*, sections 330-333. <sup>190</sup> But no such contention is made in the case. The waiver of notice found in the guaranty has no reference to the notice of acceptance.

Appellee contends, however, that we have already committed ourselves to the New York rule, and cites a number of our former decisions in support of its contention. This claim calls for a review of some of our previous cases. In *Carman v. Elledge*, 40 Iowa, 409, one Hampton had purchased a cow at public sale. Carman, the seller, refused to deliver her on Hampton's credit alone, and a note for the purchase price was drawn up and signed by Hampton. Defendant Elledge made an order on Carman to let Hampton have the cow, stating in the order that he would sign the note with Hampton. Relying on defendant's promise, Carman delivered the cow, but Elledge refused to sign or pay the note. In that case we approved the rule hitherto announced in this opinion, but held that the instrument, if a



guaranty at all, was absolute and complete, and not a mere offer or proposal. It will be noticed that the obligation of the principal debtor in that case was complete at the time the order was written, and that the acceptance of the order and the delivery of the animal were contemporaneous. That case is an authority for the rule we have just announced. In *Case v. Howard*, 41 Iowa, 479, plaintiff sold one Hills a bill of goods on the faith and credit of a writing signed by defendant, as follows: "Mr. Hills wishing to purchase one case of tobacco on credit, I hereby agree to see the same paid for in four months, should said purchase be made." Recognizing the rule in the Carman case, we said, speaking through Day, J.: "The guaranty in this case was absolute." This is all that is said regarding that point. That it was not regarded as controlling clearly appears from what follows. The opinion then recites that, when Hills returned from making his purchase he exhibited a bill showing the purchase of the tobacco on credit of four months, and a settlement of the same by note. This was held to be notice to the defendant that the condition on <sup>191</sup> which he had agreed to become liable had been performed. This case is in line with all the authorities which hold that the notice need not be in any particular form, nor need it come from the guarantee himself. Knowledge, no matter how acquired, is held to be notice, and it may be inferred from facts and circumstances warranting such a conclusion: See *Adams v. Jones*, 12 Pet. 207; *Bascom v. Smith*, 164 Mass. 61, 41 N. E. 130; *Bishop v. Eaton*, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437; *Oaks v. Weller*, 16 Vt. 63; *First Nat. Bank v. Carpenter*, 41 Iowa, 518. These cases are the only ones on which appellee relies, and we have seen that they do not support the rule contended for by it. There are some other cases to which it is well to call attention. In *Case v. Luse*, 28 Iowa, 527, the rule of *Lee v. Dick*, 10 Pet. 482, and the statement of the principle in 2 *Parsons on Contracts*, page 13, note "d," was approved; and although the instrument sued on in that case was held not to be a promise, yet it was said that, if it had been, defendant was not bound, because not notified of its acceptance. In *Farwell v. Sully*, 38 Iowa, 387, the necessity of notice of acceptance of a guaranty and of future advances was recognized. In *Crittenden v. Steele*, 3 G. Greene, 538, the promise was held original, and not collateral, and it was said that no notice of acceptance was required. But the case really turned on defects in the plead-

ings. In *First Nat. Bank v. Carpenter*, 41 Iowa, 523—a case decided the next day after the Howard opinion was filed—we said: “On this subject of notice of acceptance of guaranty there is considerable conflict in the authorities, and upon this particular point especially, which, however, we will not undertake to reconcile or determine between the conflicting cases, since it follows that if the course of dealing between the parties immediately following the making of the guaranty, together with all the connecting circumstances, is sufficient to justify a finding that defendants had notice that plaintiff was relying on the guaranty in making the advances,” etc. This statement is quite conclusive of the proposition that the court had the day before <sup>192</sup> held in the Howard case—that no notice was necessary. In *Scribner v. Rutherford*, 65 Iowa, 551, 22 N. W. 670, it is held, in effect, that a mere offer of guaranty must be accepted and notice thereof given the guarantor. We are therefore committed to the rule that a mere offer or proposal of guaranty is not a complete contract until notice of acceptance thereof is given the guarantor. That is the rule we have now reaffirmed, and, applying the rule by which to determine whether or not the promise in this case was absolute, we find that it was a mere offer or proposal, and that, as defendants had no notice or knowledge of its acceptance, it was not binding on them.

2. When a guaranty is continuing, and is unlimited in amount, and the amount for which the guarantor may be held responsible is subject to change, notice of advancements made and of the amount due when all the transactions are closed is generally held to be necessary: *Davis Sewing Machine Co. v. Mills*, 55 Iowa, 543, 8 N. W. 356; *Singer Mfg. Co. v. Littler*, 56 Iowa, 601, 9 N. W. 905. In the instant case the amount of defendants’ liability is fixed by the instrument itself, and the promise is such that notice of advancements made from time to time may well be said to have been waived. But, aside from this, the evidence shows that the Drake Roofing Company was insolvent from the time of the making of the guaranty down to the commencement of this suit. That fact alone is sufficient excuse for not giving notice of the advancements, or of the state of the account at the time the guaranty expired by limitation of time: *Louisville Mfg. Co. v. Welch*, 10 How. 473. Demand and notice of nonpayment were not essential to recovery: *Claffin v. Reese*, 54 Iowa, 544, 6 N. W. 729; *Rodabaugh v.*

Pitkin, 46 Iowa, 544; Second Nat. Bank v. Gaylord, 34 Iowa, 246.

For the error pointed out, the judgment of the district court is reversed.

Granger, C. J., not sitting.

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**Guaranty.**—That notice of acceptance is necessary to complete a contract of guaranty, see *Acme Mfg. Co. v. Reed*, 197 Pa. St. 359, 80 Am. St. Rep. 832, 47 Atl. 205; *Gano v. Farmers' Bank*, 103 Ky. 508, 82 Am. St. Rep. 596, 45 S. W. 519. That such notice is not necessary, see *London etc. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164; *Bank of Newbury v. Sinclair*, 60 N. H. 100, 49 Am. Rep. 307.

**Guaranty—Notice of Default.**—One who becomes surety on a note, relying on the guaranty of a third person that he shall not suffer thereby, is not under obligation to attempt to collect the money from the maker of the note, nor promptly to notify the guarantor of the maker's default, at least in the absence of evidence that the defendant was injured by the delay: *Bishop v. Eaton*, 161 Mass. 496, 42 Am. St. Rep. 437, 37 N. E. 665. Compare *Taussig v. Reid*, 145 Ill. 488, 36 Am. St. Rep. 504, 32 N. E. 918.

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## STATE v. MEEK.

[112 Iowa, 338, 84 N. W. 3.]

**NUISANCE—ABATEMENT—COMPENSATION.**—The abatement of a nuisance is not such a taking of private property as to require compensation to be made therefor.

**CONSTITUTIONAL LAW—POLICE POWER—FISHWAYS.** The state, in the exercise of its police power, has the right to compel the construction of fishways over dams across navigable, as well as unnavigable, streams, so long as intercommunication between the states is not thereby affected.

**CONSTITUTIONAL LAW—POLICE POWER—FISHWAYS.** The power of the state to compel a fishway to be made in a dam across a stream is not lost merely because the state itself made such dam without any fishway in it, and conveyed it in that condition without expressly reserving the right to thereafter exercise police power over it. In such case the exercise of the power to compel the construction of such fishway is not an impairment of the contract of sale of the dam.

**JUDGMENTS—RES JUDICATA—EVIDENCE OF FOUNDATION OF JUDGMENT.**—If a plea of *res judicata* is set up as a defense, oral evidence is admissible to show the facts upon which the former judgment was founded.

**NUISANCE—CONSTRUCTION OF STATUTE.**—If a statute provides, first, that the owner of any dam shall construct within a reasonable time a fishway therein, and second, that a dam without a fishway is a nuisance which may be abated, an information thereunder naming the offense charged as maintaining a nuisance and in



describing it stating that defendants maintained a dam over which they failed to construct within a reasonable time and maintain a fishway, confers jurisdiction upon the court to try defendants for maintaining a nuisance. The first and second sections of the statute should be construed together, as creating one offense, and that the maintaining of a nuisance.

**NUISANCE—JURISDICTION OF JUSTICE—CONSTRUCTION OF STATUTE.**—If one statute declares a dam without a fishway to be a nuisance which may be abated, while another statute provides that a penalty of one thousand dollars may be imposed for maintaining a nuisance when no other punishment therefor is specifically provided, a justice of the peace has jurisdiction to try for the offense of maintaining a dam without a fishway, to declare it a nuisance, and to order its abatement, although the penalty which may be imposed exceeds his jurisdiction.

**JUDGMENTS—RES JUDICATA—FORMER ACQUITTAL.**—If a civil action is to secure a forfeiture, which should have been part of the penalty in a former criminal proceeding involving the same matter, and is between the same parties, an acquittal in the criminal proceeding is a bar to the civil suit.

M. Remley, attorney general, E. R. Harlan, and Read & Read, for the appellant.

Mitchell & Sloan and Wherry & Walker, for the appellee.

**341 WATERMAN, J.** Nothing is claimed in argument by defendants on the issue that section 2548 of the code, which declares any dam constructed or maintained without a fishway to be a nuisance, is in violation of section 18, article 1, of the constitution of the state. This provision of the constitution prohibits the taking of private property for public use without making just compensation. Because of the fact that this matter is not pressed in argument, we might properly pass it without further remark; but we deem it proper to say that this point is settled against defendants' pleaded claim by the case of *State v. Beardsley*, 108 Iowa, 396, 79 N. W. 138. The authorities sustaining the proposition that a statute of this nature is a valid exercise of the police power will be found collected in that opinion. We need not again review them.

This leaves for our consideration but two questions; 1. Is section 2548 void as to defendants because of impairing the obligations of a contract? And 2. Are the matters herein involved *res judicata*?

The history of the Des Moines river land grant is so well known that we need not repeat it, further than to say that the state accepted the grant of lands from the general government, and undertook to improve the navigation of that stream by erecting a system of dam and locks. As a part of this system, it constructed and maintained for some years a dam on the

site of the one in question. After a time, in the year 1860, by an act of the general assembly, commissioners were appointed to sell the interest of the state in this and other dams on said river. <sup>342</sup> These commissioners were authorized to make deeds without warranty, and containing covenants on the part of the purchasers that they, their heirs and assigns, would forever keep said locks and dam in good repair, and that they would, at all reasonable times, pass boats through said locks, and charge only such tolls as should be agreed upon between such commissioners and the purchasers, not exceeding the maximum rates prescribed in the contract by the state of Iowa with the Des Moines Navigation and Railroad Company. On the thirty-first day of October, 1861, a conveyance was made by the commissioners, in pursuance of this power and in conformity therewith, to Robert Meek, Isaiah Meek, and Joseph Meek, of Van Buren county. The interests of Robert and Joseph Meek were thereafter conveyed to Isaiah Meek, who died some years since. The defendants are sons of the latter, and, through inheritance and conveyances from other heirs, have become vested with all of their father's rights in and to said dam. There was no express reservation in the deed from the commissioners of any right on the part of the state to exercise police powers with reference to the property conveyed. Defendants claim something because of the fact that the Des Moines river is a navigable stream. It is thought that for this reason a distinction exists between this case and that of *State v. Beardsley*, 108 Iowa, 396, 79 N. W. 138, cited above. While the dam in the *Beardsley* case was across a non-navigable stream, yet it will be seen that the writer of that opinion in reaching his conclusion assumed the right of the state to compel the construction of fishways over dams across navigable streams, and thought it necessary only to adduce arguments to show that this right extended also to dams across streams not navigable. If there is any distinction to be made, it would seem to us the state's rights are clearer in case of navigable streams than those not navigable.

The right of fishing in navigable waters has always been held common in the public, and subject to legislative <sup>343</sup> protection and control. The question most discussed by the courts is whether such control extends to non-navigable streams, where the right to fish is vested exclusively in the proprietors of the land on either side: *State v. Franklin Falls Co.*, 49 N. H. 240, 6 Am. Rep. 513; *Oliver v. Bailey*, 85 Me. 161, 27 Atl. 90.

But if adjudicated cases are desired to sustain directly the right of the state to prevent obstructions to the passage of fish in navigable streams, they are not wanting: See *Holyoke Co. v. Lyman*, 15 Wall. 500. It is not claimed on this point that the action of the state in enforcing a police power is in any way restricted by the terms of the federal constitution, nor could any such claim be supported. The power of the state to control the right of fishing in navigable waters is ample and complete, so long as intercommunication between the states is not thereby affected: Gould on Law of Waters, secs 35-43. The cases sustaining this rule will be found collected by the learned author in the note to the first of these sections: See, also, Tiedeman on Limitation of Police Power, 619.

The main contention, however, of defendants on the constitutional question presented, stated in the language of their counsel, is this: "In the case at bar the state was the owner of the river bed and also of the abutting riparian lands, and the state built the dam with no fishway in it, maintained it for years, and sold all its interest in and to it to defendants' ancestors. In this case the state did not sell and grant to us the right to build a dam; it sold and granted us a dam already built." For these reasons and upon these grounds it is sought to further distinguish this case from *State v. Beardsley*, 108 Iowa, 396, 79 N. W. 138.

Defendants rest their claim that the action here sought to be taken by the state impairs the obligation of their contract of purchase on the case of *Commonwealth v. Pennsylvania Canal Co.*, 66 Pa. St. 41, 5 Am. Rep. 329. In that case the state, owning a canal, had erected dams in the Susquehanna river to aid in supplying the canal with water. It sold both canal and dams, and <sup>344</sup> thereafter, under a statute similar to our section 2548, sought to compel the purchaser to construct, at his expense, fishways over some of the dams. The court holds that, inasmuch as no such right was reserved in the grant, the statute could not be enforced against defendants; that the power which was attempted to be exercised was that of eminent domain, and was a taking of private property for public purposes without first making compensation therefor, and for this reason amounted to an impairment of the purchaser's contract. The opinion of the trial judge, which is set out in the report, and which is expressly adopted by the appellate court, repudiates the suggestion that the statute was an exercise of the police power, but it recognizes that a different rule prevails in Mass-



achusetts. So, too, a different rule prevails in this state; for in *State v. Beardsley*, 108 Iowa, 396, 79 N. W. 138, the opinion is based largely upon Massachusetts cases, and the holding is expressly made, as we have already said, that the statute in question is a legitimate exercise of the police power of the state. This being true, the right or power of the state would be the same, in the case of a dam built by it and sold, as it would where a franchise was given to build a dam.

If the state had originally granted a franchise to defendants' ancestors to build a dam, fixing its height and breadth, would there not be as much reason for saying the statute could not be enforced as in the case at bar? Yet the *Beardsley* case in principle holds that in such an instance as that we have supposed the statute would apply. In some states it is held that, independent of any statute, one who erects a dam is required to maintain a passageway for fish: *State v. Gilmore*, 141 Mo. 506, 42 S. W. 817; *Vinton v. Welsh*, 9 Pick. 87; *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236. But it is said by defendants that the state by its grant bargained away its right to exercise this police power. If we were to concede that the state might do this in a case <sup>345</sup> of the kind we have here, we should be obliged to say that it must be done in express terms. "While the charters of private corporations are contracts, yet whenever privileges are granted, and the grant comes under review in the courts, such privileges are to be strictly construed against the corporation, and in favor of the public, and nothing passes but what is granted in clear and explicit terms": *Holyoke Co. v. Lyman*, 15 Wall. 500. Nothing is to be taken as against the state but what is expressly given: *Newton v. Commissioners*, 100 U. S. 548. Although no right was reserved in the grant under consideration to require the construction of fishways, nevertheless such right remained in the state, because it was not expressly surrendered in the grant. Defendants' ancestors acquired by the grant the dam and the interest of the state in the land opposite thereto; that is, they obtained the dam, and the means and right to maintain it. Nothing more than this was conveyed, and such a grant by the state does not abrogate its right to exercise thereafter a police power over the thing granted. In our opinion, no constitutional right of defendants is involved in this proceeding.

2. The plea of *res judicata* is founded upon the fact that in 1893 an information was filed before a justice of the peace

against these defendants and some others, charging them with the crime of nuisance, in that from April 9, 1892, up to the date of filing the information, they had maintained this dam without a fishway, and that more than a reasonable time necessary for the construction of such fishway had elapsed since the passage of chapter 188 of the acts of the seventeenth general assembly. Upon a plea of not guilty, there was a trial, which resulted in an acquittal. This information was filed, as appears from its terms, under said act of the seventeenth general assembly. That chapter is in three sections. Section 1 requires the owner of any dam to construct, within a reasonable time, and maintain, a suitable fishway across it. Section <sup>346</sup> 2 declares a dam without a fishway to be a nuisance, which may be abated. Section 3 imposes a fine of not more than fifty dollars, nor less than five dollars, for violating the provisions of the act; that is, for failing to construct such fishway within a reasonable time, or to maintain it thereafter. For a second offense, the minimum penalty is twenty dollars. It appears from oral evidence that defendants, on the hearing before the justice, admitted the maintenance of the dam without a fishway, and set up their grant from the state, in justification of their right to do so. It is also shown by the testimony of the justice that the sole ground of his judgment was that defendants had a right, under their contract with the state, to maintain the dam without a fishway. This evidence was admissible, and sufficient to establish the facts upon which the judgment was founded: *Freeman on Judgments*, sec. 273; *Emigrant Co. v. Fuller*, 83 Iowa, 599, 50 N. W. 48; *Evans v. Clapp*, 123 Mass. 165, 25 Am. Rep. 52; *Black v. Miller*, 75 Mich. 323, 42 N. W. 837; *Wood v. Faut*, 55 Mich. 185, 20 N. W. 897; *Follansbe v. Walker*, 74 Pa. St. 306.

But it is urged on behalf of the state, as to this information, that while it named the offense charged as maintaining a nuisance, it described only the misdemeanor of failing to put in a fishway within a reasonable time; and it is said the justice had no jurisdiction to try defendants for the crime of maintaining a nuisance. The information, in describing the offense, stated that defendants owned and maintained a dam over which they had failed to construct within a reasonable time, and to maintain, a fishway. By the terms of the law under which the information was filed, these acts and omissions constituted a nuisance. That act creates but one offense, and that is maintaining a nuisance. Sections 1 and 2 are to be read together. The

intent of the act was not only to punish a defendant for past derelictions, but to remedy matters for the future. It is thought, because the general penalty for <sup>347</sup> the offense of maintaining a nuisance may be a fine of one thousand dollars, the justice had no jurisdiction of that offense. Section 4092 of the code of 1873, which provides this penalty, expressly states that it is to be imposed "where no other punishment therefor is specially provided." As we have seen, a special penalty is provided for the particular offense we have under consideration, and it is one which a justice of the peace may lawfully impose. A judgment of guilty by the justice would have been a finding of the existence of the nuisance, and upon this finding it would have been his duty to issue a warrant for its abatement: Code 1873, sec. 4094. The section preceding this one provides that, when a person is adjudged guilty of a nuisance on indictment, complaint, or action, such nuisance may be abated by the court. Section 4094 recites that, when "conviction is had upon an action before a justice of the peace," he may issue a warrant of abatement. That a criminal proceeding is referred to is sufficiently evident from the use of the word "conviction."

It is further contended by appellant that an acquittal in a criminal action is not a bar to a subsequent civil proceeding founded on the same facts. That is the general rule: 1 Greenleaf on Evidence, sec. 537; Freeman on Judgments, 319a; 2 Van Fleet on Former Adjudication, sec. 488. One reason for this, even where the parties are the same, is the difference in the degree of proof necessary to make a case in the two instances. In the criminal proceeding the state can secure judgment only on proof which excludes all reasonable doubt, while in the civil action its case is made by a preponderance of the evidence. But to this rule there is one notable exception. Where the civil action is to secure a forfeiture, which would have been a part of the penalty to be imposed in the criminal proceeding, and is between the same parties, the previous acquittal is a bar: Coffey v. United States, 116 U. S. 437, 6 Sup. Ct. Rep. 437. In the case of United States v. Jaedicke <sup>348</sup> (D. C.), 73 Fed. 100, the Coffey case is considered, and the reasons taking its holding out of the general rule are explained. We think the doctrine of the Coffey case applies here. The state is plaintiff in this action, and what is sought to be recovered or effected is what would have been part of the penalty imposed by law, had there been a conviction before the justice. This action is therefore in the nature of a second prosecution for the same offense of which defendants have been acquitted. Counsel for the state rely, in



this connection, upon the case of *Martin v. Blattner*, 68 Iowa, 292, 25 N. W. 131, 27 N. W. 244. That was an action to enjoin a liquor nuisance, brought after defendant had been acquitted before a justice of the peace upon an information which charged him with selling such liquor. It is enough to show the want of application of that case to the issues here to call attention to the fact that the parties to the two actions were not the same. But we may say, further, that the justice in that case had no power to abate the nuisance, or to impose any penalty therefor, the punishment prescribed being beyond his jurisdiction. Criminal prosecutions for that offense must be by indictment: Code, sec. 2384. It is true that an acquittal on the charge of maintaining a nuisance does not bar another prosecution under changed conditions. But here the conditions have not changed. The testimony of the justice shows, as we have said, that he held defendants to have a contract right to maintain the dam without a fishway. Unappealed from, that judgment is final; for there is no showing that defendants have lost the right since the former trial. The plea of *res judicata* is sustained, and the judgment below affirmed.

Granger, C. J., not sitting.

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**Fishways.**—The government may compel the owners of dams to allow a passageway for fish: *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236. See, also, *Commonwealth v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386.

**Evidence.**—Records of the conviction or acquittal of a party, in a criminal prosecution, are not usually evidence of the facts on which they are based, in a civil action: Note to *Steel v. Cazeaux*, 13 Am. Dec. 291; *Corbley v. Wilson*, 71 Ill. 209, 22 Am. Rep. 98. Yet the mere fact that one proceeding is civil and the other criminal does not render the doctrine of *res judicata* inapplicable: *State v. Adams*, 72 Vt. 253, 82 Am. St. Rep. 937, 47 Atl. 779. And in some cases a judgment in a prior prosecution has been admitted in a civil action for the same wrong: Note to *Steel v. Cazeaux*, 13 Am. Dec. 291; *Anderson v. Anderson*, 4 Greenl. 100, 16 Am. Dec. 237; *Griffis v. Sellars*, 2 Dev. & B. 492, 31 Am. Dec. 422; *State v. Adams*, 72 Vt. 253, 82 Am. St. Rep. 937, 47 Atl. 779.

## STATE v. HARVEY.

[112 Iowa, 416, 84 N. W. 535.]

**EVIDENCE—EXHIBITION OF CHILD AS.**—On a prosecution for bastardy, the exhibition of a child nine months old to the jury for the purpose of showing its resemblance to the defendant cannot be permitted.

R. B. Parrott and L. Kinkead, for the appellant.

Brennan & Brennan, for the appellee.

**416** LADD, J. It is enough now to say that the evidence was such as to leave the question of defendant's guilt of begetting complainant's child, then nine months old, at the least doubtful. Her story implicating him appears not very probable, and her admission of having had intercourse with Waller a year previous to its conception, and sleeping alone in a room accessible to the latter continually up to that time, indicates, notwithstanding her denial of repetition, the possibility of its having been his offspring. So that the introduction of the immature child in evidence "for the jury to look at; . . . to examine as to the identity and resemblance between the baby and putative father"—as stated by counsel for the state—may well have played an important part in settling the controversy. The color of its eyes and hair, its complexion, the contour of the brows and shape of hands, any or all of which may have related back three or four generations, doubtless were given weight in making this comparison. What they were we have no means of knowing, **417** nor does this record disclose in what respects these differed from or resembled the hair, eyes, complexion, brows, or hands of defendant, or of Waller. Thus, the jury based their verdict in part at least, on their individual knowledge of facts, or opinions resting on facts, of which this court, on appeal, can acquire no information, making of themselves "silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of errors, if any, could be afforded either party": See *Close v. Samm*, 27 Iowa, 507; *Washburn v. Milwaukee etc. Ry. Co.*, 59 Wis. 370, 18 N. W. 328. In such a case might a new trial ever be ordered because of the insufficiency of evidence? Nevertheless, this court, in *State v. Smith*, 54 Iowa, 104, 37 Am. Rep. 192, 6 N. W. 153, held that a child two years and one month

old might be exhibited to the jury, though to exhibit one of three months had been adjudged an error in *State v. Danforth*, 48 Iowa, 43, 30 Am. Rep. 387. While conceding that "resemblances often exist between persons who are not related, and are wanting between persons who are," the ruling seems to rest on the proposition that "what are called 'family resemblance' are sometimes so marked as scarcely to admit of a mistake." With respect to proper age, it was said that "a child which is only three months old has that peculiar immaturity of features which characterizes an infant during the time that it is called a 'babe.' A child two years old or more has, to a large extent, put off that peculiar immaturity." If this is to be the criterion, then, surely, a child of nine months is too immature to afford aid to the jury in settling its paternity. True, resemblances then are frequently imagined. But what one will construe as a similarity, another, with the same knowledge of the parties between whom the comparison is made, will be unable to detect. If alike in some respects, they differ in others. It is all a matter of notion, fancy, or guesswork, and ought to be given the slightest weight in determining an issue fraught with such <sup>418</sup> grave consequences. In *People v. Carney*, 29 Hun, 47, the court, observing that children of the same family have eyes and hair of different colors, declared that it is "a dangerous doctrine to permit a child's paternity to be questioned or proven by the comparison of the color of its hair or eyes with that of the alleged parent." In *Hanawalt v. State*, 64 Wis. 84, 54 Am. Rep. 588, 24 N. W. 489, the exhibition of a child under a year old was held to have been improper, the court saying: "In any case this kind of evidence is inherently unsatisfactory, as it is a matter of general knowledge that different persons, with equal opportunities of observation, will arrive at different conclusions, even in the case of mature persons, where a family likeness will be fully developed if there be any; and when applied to the immature child, its worthlessness as evidence to establish the fact of parentage is greatly enhanced, and is of too vague, uncertain, and fanciful a nature to be submitted to the consideration of a jury." As opposed to such exhibitions, see, also, *Clark v. Bradstreet*, 80 Me. 466, 6 Am. St. Rep. 224, 15 Atl. 56; *Risk v. State*, 19 Ind. 152; *Reitz v. State*, 33 Ind. 187; *Ingram v. State*, 24 Neb. 33, 37 N. W. 943. Without expressing an opinion as to the correctness of *State v. Smith*, 54 Iowa, 104, 34 Am. Rep. 192, 6 N. W. 153, this court is not prepared to extend the rule there approved, and sanction the exhibition of a child under two years of age to the jury, as



affording any aid in ascertaining its parentage; and in this class of cases, where, as is well known the feelings and sentiment so often enter into the contest, the exhibition of the fruit of the unlawful relation cannot have been otherwise than extremely prejudicial. An exception may, however, exist where the parents are alleged to be of different races: *Garvin v. State*, 52 Miss. 207; *Warlick v. White*, 76 N. C. 176. In *Gilmanton v. Ham*, 38 N. H. 108, and *Finnegan v. Dugan*, 14 Allen, 197, the age of the child exhibited does not appear, while comparison at any age was upheld in *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. 600, and *State v. Woodruff*, 67 N. C. 89: See, <sup>419</sup> also, *Jones v. Jones*, 45 Md. 151. These decisions seem to have been influenced somewhat by the ruling of Lord Mansfield in the *Douglass* case, before the house of lords in 1769, allowing resemblance of adults to be shown. That marks of family resemblance often exist between adults and even mature children may readily be conceded, but it does not follow that this is generally true of nursing or immature babes, with unsettled features, and peculiar characteristics undeveloped.

Reversed.

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In *Bastardy Proceedings* a child of immature age should not be exhibited to the jury to show resemblance: *Clark v. Bradstreet*, 80 Me. 454, 6 Am. St. Rep. 221, 15 Atl. 56.

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### HAWK v. HARRIS.

[112 Iowa, 543, 84 N. W. 664.]

**EXECUTIONS AGAINST MINORS—CONFLICT OF JURISDICTION.**—If a minor's property has been legally seized under attachment in an action against him, the subsequent appointment of a guardian for him does not transfer to the appointing court jurisdiction to enforce the judgment obtained against him, nor remove the property from the custody of the court rendering such judgment, so as to rob it of power to issue execution against such property.

**CONTRACTS OF MINORS.**—A promise by a minor to marry may constitute an inducement to sexual intercourse, though both parties know that the promise cannot be enforced.

H. F. Andrews and De Lano & Meredith, for the plaintiff appellant.

J. Hudspeth, for the defendant, also appellant.

**544** GIVEN, J. No question is made on this appeal as to plaintiff's right to bring and prosecute this action as she did, nor as to her right to have and to levy the attachment as was done. Defendant insists that, a guardian having been appointed and qualified to take charge of the defendant's property, this judgment can only be enforced through the probate court. Plaintiff contends that **545** her action being properly brought and prosecuted, and the attachment rightfully issued and levied before a guardian was appointed, and when the property was not in the custody of the probate court, it came into the custody of the law court by virtue of the attachment and levy, and, being thus in its custody, it has full control over it for the satisfaction of the judgment, and any right of the probate court through its guardian to control the same is subordinate to the custody of the law court, and that for these reasons the plaintiff is entitled to the benefits of her attachment and to execution. This case must not be confounded with those wherein the property was in custodia legis at the time the attachment on execution was issued. When the property was attached it was not in custodia legis, but became so by the levy of the attachment. No question is made but that the plaintiff would have been entitled to execution for the sale of the attached property were it not for the appointment of the guardian. Any control that the probate court acquired over this property through its guardian was certainly subject to the existing conditions, and we have seen that one of the conditions was that the property was in custody of the law court, with full power to apply it to the satisfaction of its judgment. Defendant argues that if his estate were insolvent, and this property allowed to be sold on execution, there could not be a pro rata distribution to creditors, as provided in section 3227 of the code, and that the plaintiff in such case would have an advantage over other creditors. There is neither allegation nor proof that his estate is insolvent, but if there were, and plaintiff has gained a priority over other creditors by virtue of her attachment, the other creditors would not be entitled to a pro rata distribution. The defendant cites no authority, nor do we find any, in support of his contention that because of the appointment of the guardian the plaintiff must look to the probate court for the enforcement of her judgment. It is said that the learned district judge based his conclusions upon *Coffin v. 546* *Eisiminger*, 75 Iowa, 30, 39 N. W. 124; *Shaffner v. Briggs*, 36 Ind. 55, 10 Am. Rep. 1; *Allen v. Von Rosenberg* (Tex. Supp.), 16 S. W. 1096. As we view those

cases they do not support the conclusion. In *Allen v. Von Rosenberg* (Tex. Supp.), 16 S. W. 1096, the will provided that the executrix should act independently of the probate court, and this she attempted to do in disposing of real estate; and it was held that the minor, having title to the land, was not thereby estopped from disputing the validity of a decree affirming the action of the executrix. In *Shaffner v. Briggs*, 36 Ind. 55, 10 Am. Rep. 1, the court, on the fifteenth day of February, 1868, upon the petition of the guardian, ordered the sale of the lands of the minor. After this order, and before sale, judgment was rendered against the minor, and the land was sold at sheriff's sale under the judgment. Seventeen days later Briggs purchased the land from the guardian. It was held that the title to the property was in the purchaser at the execution sale; that the order for the sale of the land did not operate in praesenti, and convert the land into assets in the hands of the guardian, so as to prevent the judgment from operating as a lien on the land, and that the title of the purchaser at guardian's sale did not relate back to the order of sale, so as to prevent any intervening levies or rights being acquired; and that the lands of the infant may be sold on execution against him. In *Coffin v. Eisinger*, 75 Iowa, 30, 39 N. W. 124, the guardianship existed at the time the action was brought and attachment issued, wherefore whatever belonged to the estate was in custody of the probate court. The guardian was garnished under the attachment, and it was under these circumstances that we held that it was proper for the judgment creditor to apply to the probate court for an order commanding the guardian to pay the judgment. We said: "It was the duty of the guardian to pay the judgment under the direction of the probate court. He failed to pay the judgment, and neglected to ask the instruction of the probate court in regard to it. Under these facts it was proper for the plaintiff to <sup>547</sup> obtain an order to compel the guardian to perform his duty. It may be that this was not necessary, and that ample relief might have been obtained by other means; but we regard it as one of the methods authorized by law for the collection of the judgment, and the record fails to disclose any fact which makes it improper in this case." A marked distinction between that case and this is that the matter sought to be subjected to the payment of the judgment was in the custody of the probate court under the existing guardianship. We are of the opinion that the court erred in dissolving the attachment and releasing the attached property, and in ordering that execution



should not issue on the judgment, and that the judgment should be enforced through the probate court.

2. The question presented on defendant's appeal is this: He asked an instruction as follows, which was refused: "If you find that at the time plaintiff claims that defendant promised to marry her he was a minor, and she knew that fact at the time, she could not, in law, claim that such promise, if any, induced her to have sexual intercourse with defendant, if such an act or acts occurred, because a minor is, in law, incapable of entering into any binding marriage contract. (To the refusal to give which, defendant, at the time, excepted.)" The first count of the petition, claiming damage for a breach of marriage contract, was withdrawn from the consideration of the jury for the reason that because of defendant's minority he was incapable of making such a contract, so as to be bound thereby, and therefore the defendant contends that evidence of the promise of marriage was not competent as showing an inducement to sexual intercourse. Surely, such a promise might form an inducement, even though both parties knew that it could not be enforced. There was no error in refusing the instruction. Our conclusion is that the judgment of the district court must be reversed on plaintiff's appeal, and affirmed on defendant's appeal.

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**Execution.**—Where an infant's land was sold in pursuance of an order of court, granted on petition of his guardian, and between the time of granting the order and of the sale a judgment was recovered against the infant and the land sold under execution, it was held that the purchaser's title under the guardian's sale did not relate to the date of the order of sale, but that the property passed under the execution sale: *Shaffner v. Briggs*, 36 Ind. 55, 10 Am. Rep. 1.

**Breach of Promise.**—Infancy as a defense to an action for a breach of promise to marry is discussed in the monographic note to *Shackleford v. Hamilton*, 40 Am. St. Rep. 174.

## THORNE v. CLARK.

[112 Iowa, 548, 84 N. W. 701]

**COVENANTS—WARRANTY OF TITLE.**—A covenant of warranty of title does not protect the grantee against adverse claims or suits for which the grantor is not responsible, but only against claims or suits based on a legal foundation, and if a suit by an adverse claimant is groundless, and results in favor of the title warranted, the purchaser is not entitled to recover from the grantor for costs and expenses incurred in defending the suit.

**COVENANTS OF WARRANTY OF TITLE** do not run against apparent but unfounded titles in the land, but only against hostile titles in fact superior to that of the grantor. Hence, the grantee cannot recover of his grantor the expense of removing an apparent but unfounded cloud upon his title.

The plaintiff Thorne brought an action and recovered judgment against the heirs of one J. S. Davis, quieting the title to certain land conveyed by said heirs to the defendant Clark, and by him conveyed by warranty deed to Thorne. The present action was to recover the expenses of prosecuting such former suit. Plaintiff recovered judgment and defendant appealed.

O. C. Brown and L. L. Delano, for the appellant.

E. T. Hatfield, for the appellee.

**549 WATERMAN, J.** There is a dispute between the parties as to whether this case was tried below as an equitable or law action. It is purely a law issue, and appellee insists it was so tried. Without deciding the point, we shall assume the position taken by appellee on this matter to be correct, and will consider only the exception taken to the judgment. It is conceded that this land was the homestead of John S. Davis, and that after his death, and down to the time of her decease, his widow continued to occupy it, taking no steps to have her dower interest set apart. Nor is there any dispute but that under the rule established by decisions of this court, this occupancy amounted to an election by the widow to take a homestead right, and by this election she lost her dower interest, so that on her death she had no estate in this land which descended to her heirs. It was upon this ground that plaintiff succeeded in his action to quiet title. It is insisted, however, on plaintiff's part, that the evidence of the fact that the widow of John S. Davis had forfeited her dower right did not appear of record, but had to be obtained outside; that the defendants in the action

to quiet title were the apparent owners of an interest in the land, and he had a right, at his grantor's expense to remove the cloud. This presents the question whether a covenant of warranty runs <sup>550</sup> against appearances, or only against substantial defects. In 1 Jones on Real Property, section 893, it is said: "Neither the covenant for quiet enjoyment, nor that of warranty, protects the grantee against adverse claims or suits for which grantor is not responsible, but only against claims and suits based on a legal foundation." Again, the same author, in section 985, says: "If the suit by an adverse claimant is groundless, and results in favor of the title warranted, the purchaser is not entitled to costs and expenses incurred in defending the suit. The grantor does not warrant that no one shall make a claim of adverse title, but only that no one shall make a claim which shall be adjudged valid and paramount to the title conveyed by his deed." In this connection we may call attention to the fact that the warranty we are considering was against the "lawful claims of all persons whomsoever," although this, perhaps, is the legal effect of any general warranty under the code. While an actual ouster is not necessary, in this state, before an action may be brought for breach of warranty, yet the hostile title asserted must be in fact superior: *Sac County Bank v. Hooper*, 77 Iowa, 435, 42 N. W. 363; *Eversole v. Early*, 80 Iowa, 601, 44 N. W. 897. If the outstanding record title is wholly invalid, it will not amount to a constructive ouster, so as to give a right of action to the grantee: *Semple v. Wharton*, 68 Wis. 626, 32 N. W. 690. Plaintiff relies principally for support in his position upon two cases from this court—*Yokum v. Thomas*, 15 Iowa, 67, and *Meservey v. Snell*, 94 Iowa, 222, 58 Am. St. Rep. 391, 72 N. W. 767. In both of these cases the hostile title was based upon a patent from the government, and, although without equity, it would have prevailed in a court of law. In the last mentioned of these cases the general rule is stated that a covenant of warranty does not protect against every unfounded adverse claim, and authorities are cited in support of the proposition. The court, through Robinson, J., then proceeds as follows: "This case and the Yokum case are peculiar, and distinguishable from most others by the fact that the general government, the source from which title emanated, with power in the first instance <sup>551</sup> to determine its grantees, had apparently set aside all acts and proceedings by which the first title was created, and had issued muniments of title to another grantee." So, too, upon similar principles, the same exception is noted in Jones on Real Property,



section 913. It is manifest the cases upon which plaintiff relies lay down, not a rule, but an exception to a rule, and that the case at bar does not come within it.

A number of other matters are discussed by counsel for appellant, but as what we have said disposes of the case, we shall not further notice them.

Reversed.

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**Covenants that Run with the Land** are discussed at length in the monographic note to *Geiszler v. De Graaf*, 82 Am. St. Rep. 664-690.

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### KILMER v. GALLAHER.

[112 Iowa, 583, 84 N. W. 697.]

**ATTORNEY AND CLIENT—AUTHORITY TO CONSENT TO JUDGMENT.**—An attorney, under a general employment, has no authority to consent to a judgment by compromise against his client, without the latter's knowledge or consent. A judgment so rendered is void.

H. L. Robertson and W. H. Killpack, for the appellant.

Roadifer & Arthur, for the appellee.

**584 GRANGER, C. J.** It is an undisputed fact that the attorney for defendant agreed to a settlement of the case and a judgment against his client, without his knowledge or consent, and he was an attorney under a general employment. In *Rhutasel v. Rule*, 97 Iowa, 20, 65 N. W. 1013, we cited and quoted from *Ohlquest v. Farwell*, 71 Iowa, 231, 32 N. W. 277, and held that an attorney under a general employment had no authority to consent to judgment against his client, or waive any cause of action or defense in his case. We approved the same rule in *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 52 N. W. 534. The case of *Bigler v. Toy*, 68 Iowa, 688, 28 N. W. 17, holds to the same rule. In that case a compromise was made by an attorney for plaintiff, and this court said: "We are of the opinion that the compromise in no respect binds the plaintiff, because Irwin had no power or authority to make it." It is true the case relies upon the rule as to an attorney with a claim for collection, that he cannot receive in payment less than the amount due; but the compromise was in a pending action, and the case

seems to hold that the rule as to authority extends to a suit in which the claim is involved. Appellee refers us to the case of *Potter v. Parsons*, 14 Iowa, 286. The cases we have cited are all <sup>585</sup> since the *Potter* case, and in one of them it is referred to, and it seems to have been the view of the court that the rule we have stated obtains notwithstanding. The case refers to *Holker v. Parker*, 7 Cranch, 436. We have examined the case, and, while it contains the language on which this court then relied as to a compromise by an attorney, the case holds in clear language such a compromise to be, in itself, void. If void, we do not see how such a compromise can be sustained merely because not so unreasonable in itself as to be exclaimed against by all. A void thing is entirely without force or validity for any purpose. Even as a judgment it is assailable directly or indirectly, and at all times. It has no more validity if reasonable than if unreasonable. In fact, the *Holker* case no more than says the court would be disinclined to disturb a judgment obtained by such a compromise, which was not so unreasonable in itself as to be exclaimed against by all. It is not a positive statement of a rule of law, but, rather, what might be the leaning of the court under such a state of facts. In view of all the authorities, we are disposed to adhere to the rule so often stated, that an attorney, under a general employment, has no authority to consent to a judgment by compromise against his client. With this conclusion the judgment must be reversed.

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**Compromise Judgment.**—If an attorney's conduct is fraudulent in procuring a compromise and entry of a judgment thereon, the party or client is not bound by it: *De Louis v. Meek*, 2 G. Greene, 55, 50 Am. Dec. 491. See, further, *Schmidt v. Oregon Gold Min. Co.*, 28 Or. 9, 52 Am. St. Rep. 759, 40 Pac. 406, 1014. An attorney employed merely as such to collect a debt has no power to compromise the claim after judgment: *Watt v. Brookover*, 35 W. Va. 323, 29 Am. St. Rep. 811, 13 S. E. 1007.

## STATE v. SCHLENKER.

[112 Iowa, 642, 84 N. W. 698.]

**CONSTITUTIONAL LAW—ADULTERATION OF MILK.**—A statute imposing a penalty for selling adulterated milk, and declaring adulteration to be the “addition of water or any other substance or thing” to milk, is not unconstitutional as invading the province of the judiciary to construe statutes.

**CONSTITUTIONAL LAW—STATUTE CONTAINING DEFINITION.**—The legislature has power to prescribe legal definitions of its own language. When an act passed by it embodies a definition, it is binding on the courts.

**CONSTITUTIONAL LAW—POLICE POWER—ADULTERATION.**—It is within the police power of the state to prohibit the sale of adulterated milk, and it is immaterial whether the foreign adulterating matter is or is not injurious to health, or whether there is or is not fraud in the sale.

**CRIMINAL LAW—PROOF OF INTENT.**—If criminal intent is not an essential element of an offense described in the statute, it need not be shown in order to justify a conviction.

**CONSTITUTIONAL LAW—POLICE POWER.**—The fourteenth amendment to the constitution of the United States does not impose any restraint on the exercise of the police power of the state.

M. Remley, attorney general, and C. A. Van Vleck, assistant attorney general, for the state.

W. N. Jordan and J. C. Hume, for the appellee.

**643** DEEMER, J. The statute under which the information was filed reads as follows: “If any person shall sell . . . any adulterated . . . milk . . . he shall be fined,” etc.: Sec. 4989. Section 4990 reads: “For the purpose of this chapter the addition of water, or any other substance or thing, to whole milk or skimmed milk or partly skimmed milk, is hereby declared an adulteration,” etc. There is no question that defendant sold milk to various persons into which he had put and mixed boracic acid. Some of them were notified of the adulteration, **644** but others were not. He testified that he dissolved five pounds of the acid in twenty gallons of water, and added one pint of the solution to ten gallons of milk; that he used it as a preservative, and told quite a number of his customers that he was using the solution for the purpose indicated; that he never attempted to deceive any of his customers regarding the use of the solution; and that its use was necessary “to keep the milk from souring.” He also introduced experts to show that the quantity of boracic acid used tended to prevent decomposi-



tion, and would have no deleterious effect on the consumers. For the purpose of the case, we must assume that the quantity of acid used by the defendant in the milk sold by him had no deleterious effect, but tended to prevent decomposition and the development of germs. The experts also testified, however, that the addition of an excessive amount of boracic acid would have a deleterious effect, in that it would retard the formation of gastric juice in the stomach. The learned district judge filed an opinion in which he held, in effect, that the statute, construed literally, was unconstitutional, and that the evident intent of the legislature was to prohibit sales of anything that would operate as a fraud upon the buyer, or prove deleterious to his health, and that, as the defendant was guilty of no fraud, and the adulteration was harmless, he had not violated the law. These propositions are insisted upon by the appellee, and further contention is made that if the statute is not so construed it is unconstitutional, for various reasons, that will be referred to during the course of the opinion. It seems to us that the construction placed on the statute by the trial court is a strained and unnatural one. The language of the enactment is plain, and in view of previous legislation there is no doubt that the act should have a literal interpretation. That the legislature so intended is not open to serious debate. So construed, are the acts in question constitutional?

645 Section 4990 is said to be void because it invades the judicial province, in that it is not permissible for the legislature to make certain evidence conclusive of a question that may be submitted to judicial determination. No doubt, the legislature cannot indirectly dispose of a cause by prescribing conclusive rules of evidence, and it has no power to direct the judiciary in the interpretation of existing statutes: *Groesbeck v. Seeley*, 13 Mich. 329; *Johns v. State*, 55 Md. 362; *Reiser v. William Tell etc. Assn.*, 39 Pa. St. 137; *Salters v. Tobias*, 3 Paige, 338. But it does have power to prescribe legal definitions of its own language, and, when an act passed by it embodies a definition, it is binding on the courts: *Smith v. State*, 28 Ind. 321; *Jones v. Surprise*, 64 N. H. 243, 9 Atl. 384; *Byrd v. State*, 57 Miss. 243, 34 Am. Rep. 440; *Herold v. State*, 21 Neb. 50, 31 N. W. 258; *Clay v. Central R. R. etc. Co.*, 84 Ga. 345, 10 S. E. 967; *People v. Board of Supervisors*, 16 N. Y. 424. Even declaratory statutes are entitled to respectful consideration by the courts, although not always binding: *Cooley on Statutory Crimes*, 2d ed., sec. 91; *People v. Board of Supervisors*, 16 N.

Y. 424; *Lambertson v. Hogan*, 2 Pa. St. 25. The definition given by the legislature in section 4990 of the code as to the term "adulteration" is valid and binding. Such legislation does not trench on the powers of the judiciary, and is not invalid for the reason suggested.

But it is said that the legislature had no power to forbid the sale, without deceit or fraud, of a harmless and wholesome article of food. This may be true, as a general proposition; but it is also true that in virtue of the police power it may pass such laws as are, or may reasonably appear to be, necessary for the health, comfort, and safety of the people. No clear and comprehensive definition of the police power has ever been given, and it is doubtful if one can be framed that will be accurate and cover every conceivable <sup>646</sup> case that may arise. It is much easier to determine whether the particular case comes within the scope of the power, than to give a definition that will be applicable to all cases. In *Railroad Co. v. Husen*, 95 U. S. 465, it is said: "The police power of a state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and to the protection of all property within the state, and hence to the making of all regulations promotive of domestic order, morals, health, and safety." The power belongs to the several states, and not to the federal government, save in exceptional cases; and so long as the legislature does not pass the limits prescribed by the federal or state constitutions, courts have no authority to interfere on the ground that the acts in question violate natural principles of right and justice. Ordinarily, the legislature determines when the public welfare and safety demand its exercise; and, as a general rule, courts have nothing to do with the policy, wisdom, or necessity of the enactment. Of course, the state cannot, by arbitrarily assuming that a commodity is injurious to the health or comfort of the people, impair individual rights guaranteed by the constitution. The police power of the state, like every other, is subject to the constitution, and cannot be used as a cloak under which to disregard constitutional rights or restrictions: *Railroad Co. v. Husen*, 95 U. S. 465; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. The question is, of necessity, primarily with the legislature, and its decision should not be lightly disregarded by the courts. Courts will not interfere, as a rule, unless there is a plain excess or usurpation of power, and in case of doubt it should be solved in favor of the power of the legislature to make the enactment. It was an indictable offense at common law to mix unwholesome

ingredients, such as alum, in bread, or to mix unwholesome substances in anything intended for the food of man. There is an ancient statute (Stat. 51 Henry III) prohibiting the sale of corrupted wine, contagious or unwholesome flesh, or flesh <sup>647</sup> that is bought of a Jew: 4 Blackstone's Commentaries, 162. In *Rex v. Dixon*, 3 Maule & S. 11, defendant was indicted for furnishing bread not fit for food. It appeared that the loaves were strongly impregnated with alum, and that large pieces of crude alum were found in them. Defendant's motion for a new trial, filed after a verdict of guilty, was overruled; the court saying that "alum being perilous to health, in the form used, it is immaterial that if used in certain quantities it was not noxious, but wholesome." Statutes enacted to secure the sale of pure food and to prevent adulteration are quite common in this country, and have ever been referred to the police power: See English Sale of Food and Drugs Act of 1875, c. 63; Tenn. Laws 1859-60, c. 81, sec. 4; Mass. Rev. Stats., c. 131, sec. 1. They are enacted to prevent fraud and to conserve the public health, and as such are a valid exercise of the police power: *State v. Campbell*, 64 N. H. 492, 13 Atl. 585; *People v. Arensburg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308; *Waterbury v. Newton*, 50 N. J. L. 534, 14 Atl. 604; *Powell v. Pennsylvania*, 127 U. S. 679, 8 Sup. Ct. Rep. 992, 1257; *Commonwealth v. Waite*, 11 Allen, 264, 87 Am. Dec. 711; *State v. Smythe*, 14 R. I. 100, 51 Am. Dec. 344; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107; *Commonwealth v. Gordon*, 159 Mass. 8, 33 N. E. 709; *Commonwealth v. Schaffner*, 146 Mass. 512, 16 N. E. 280.

That the sale of milk to which water and boracic acid have been added may amount to a fraud upon the purchaser is evident. He has the right to assume that the milk he buys is unadulterated, and that it will go through the natural process of oxidation and decomposition. He may wish to use sour milk for culinary purposes, and has the right to assume that nothing has been added to prevent chemical change. Counsel for appellee responds to this thought by saying that <sup>648</sup> defendant notified all persons to whom he sold that boracic acid had been added, and that no one of the witnesses for the state was deceived. The record does not bear them out in this contention, but, even if it did, we would have no help therefrom in solving the constitutional question involved. It may be conceded that the milk sold by defendant was not harmful to the health of



those who used it; but it is certainly dangerous to the public to permit milkmen and those dealing in milk to adulterate it in such manner as to change its constituent properties. The statute does not deprive the defendant of his property, but it does impose upon him the duty of so using it that no injury will result to others most likely to be affected by a disregard on his part of the reasonable health regulations that it enacts. Almost every police regulation affects, to a greater or less extent, some property right; but these rights are subject to such reasonable limitations in their enjoyment as will prevent them from being injurious, and to such reasonable regulations as the legislature, under the constitution, may deem necessary and expedient. In the Schaffer case, from Massachusetts, and the Campbell case, from New Hampshire, it is expressly held to be immaterial whether the foreign matter is or is not injurious to health. The court in the latter case said that, "if the legislature has power to fix a standard, it must judge whether or not milk below that standard is unwholesome"; and in the former it was held that the addition of pure water to milk was an adulteration punishable under the statute. In *Commonwealth v. Gordon*, 159 Mass. 8, 33 N. E. 709, it is expressly held that the addition of boracic acid to cream is an offense under the statute of the state of Massachusetts: See, also, *Commonwealth v. Wetherbee*, 153 Mass. 159, 26 N. E. 414. In *Commonwealth v. Waite*, 11 Allen, 264, 87 Am. Dec. 711, the exact question made by defendant in this case was decided, the court using the following language: "It is innocent and lawful to sell pure milk, and it is innocent and lawful to sell pure water; and the argument is that the legislature <sup>649</sup> has no power to make the sale of milk and water when mixed a penal offense, unless it be done with a fraudulent intent. But it is notorious that the sale of milk adulterated with water is extensively practiced with fraudulent intent. It is for the legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud, and to adapt the protection to the nature of the case. They have seen fit to require that every man who sells milk shall take the risk of selling a pure article. No man is obliged to go into the business, and by using proper precautions any dealer can ascertain whether the milk he offers for sale has been watered. The court can see no ground for pronouncing the law unreasonable, and has no authority to judge as to its expediency." It is not enough to show that defendant did not intend to defraud, or that the milk he sold was wholesome. If that were true, almost any law

intended to protect the public health and safety might be overthrown. It is enough that adulteration such as prescribed by the statute may defraud or prove deleterious to the public health or comfort. The legislature may well determine that the adulteration of milk tends to facilitate vicious practices, and that it ought to be prohibited. To defeat the act prohibiting such conduct it is not enough to show that in the particular case the article sold was innocuous. Criminal intent is not an essential element of the offense described in the statute, and need not be shown in order to justify a conviction: *Commonwealth v. Smith*, 103 Mass. 444; *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Nichols*, 10 Allen, 199; *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *State v. Smith*, 10 R. I. 258. If the statute required knowledge or intent, of course these matters should be shown. These propositions are a sufficient answer to the opinion of the trial court, holding that an intent to defraud is necessary.

Appellee further contends that the statute in question is in violation of the fourteenth amendment to the federal constitution. <sup>650</sup> Such contention is not sound, for it is fundamental that this amendment does not impose any restraints on the exercise of the police power of the state for the protection of the safety, health, or morals of the community: *Barbler v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 371; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865; *People v. King*, 110 N. Y. 418, 6 Am. St. Rep. 389, 18 N. E. 245. The conclusion of the learned trial judge was made to depend almost wholly on the facts developed by the evidence. If the jury had found the milk as adulterated—unwholesome—we have no doubt that the trial court would have sustained the convictions. That the constitutionality of a statute ought not to be made to depend on the finding of a jury on the facts of a case is manifest. If the plain provisions of the constitution have been violated, or if the act cannot be said to be a proper exercise of the police power, in view of facts of which judicial notice may be taken, then the duty of declaring the act invalid is clear. But, in the absence of such finding, the act should stand. Ordinarily, it cannot, we think, be a question of fact for a jury: See *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107; *People v. Smith*, 108 Mich. 527, 62 Am. St. Rep. 715, 66 N. W. 382. *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29, is relied on by appellee. That case involved the right to sell oleomargarine, and not the question of adulteration. That it is not in conflict with anything we have announced

clearly appears from the Cipperly case, 101 N. Y. 634, 4 N. E. 107; See, also, *People v. Arensburg*, 103 N. Y. 388, 47 Am. Rep. 741, 8 N. E. 736. *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. Rep. 757, involved the commerce clause of the federal constitution; and it was held that the legislature could not, under the guise of the police power, absolutely prohibit the sale of articles which are the subjects of interstate commerce. It does not overrule *Powell v. Pennsylvania*, 651 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, or *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. Rep. 154, and, as those cases sustain our holding, we may well rest thereon.

Lastly, it is said that section 4990 of the code is void because the subject is not expressed in the title. The act is found in the code of 1897. Whether or not it existed prior to that time is immaterial to our present inquiry. Some claim is made that the title of the act adopting the code, and particularly that part of it under consideration, is insufficient. Our attention has not been called to any defects in the enactment of the code, either as a whole, or by titles and chapters; and in the absence of such a showing, and of the most cogent arguments in support of the claim, we are not justified in holding that either the code, or any section or chapter thereof, is void because of the constitutional provision defining what shall be embraced in the title of an act. The title to the original act was sufficiently specific: *State v. Forkner*, 94 Iowa, 1, 62 N. W. 772; *State v. Snow*, 81 Iowa, 642, 47 N. W. 777; *Christie v. Life Indemnity etc. Co.*, 82 Iowa, 360, 48 N. W. 94.

We have covered all points made in argument, and reach the conclusion that the trial court was in error in his conclusions of law; and we therefore reverse the same, to the end that the proper rule may be established for such cases.

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**Statutes Prohibiting the Sale of Adulterated Milk and declaring a violation of the prohibition to be a crime are constitutional: See the monographic note to *Booth v. People*, 78 Am. St. Rep. 243.**



## HOLMAN v. HODGES.

[112 Iowa, 714, 84 N. W. 950.]

**WATERS AND WATERCOURSES—ISLAND IN RIVER—ACCRETION AND RELICTION.**—If an island arises in a navigable river unconnected with the shore, the riparian owner has no title to such island although it is gradually added to by accretion or reliction until it is connected with the shore.

**WATERS AND WATERCOURSES—ISLAND IN RIVER—TITLE TO—ACCRETION AND RELICTION.**—The owner of contiguous land is not the owner of an island that springs up in the midst of a navigable river, though it is on one side of the thread thereof. If by accretion to such island the water margin unites with the shore, the newly made land becomes part of the island and the riparian ownership is not extended.

**WATER AND WATERCOURSES—ISLAND IN RIVER—ACCRETION AND RELICTION—TITLE TO.**—If an island springs up in a navigable stream, and by gradual reliction or accretion thereto it is finally joined to the mainland, the title to the whole of the land thus formed remains in the state.

**WATER AND WATERCOURSES—ISLAND IN RIVER—TITLE TO.**—The title to an island arising in a navigable stream and never becoming a part of the government domain, remains in the state.

Lewis & Beardsley, for the appellants.

E. J. Stason, for the appellee.

<sup>715</sup> LADD, J. There is little controversy concerning the facts of this case. The plaintiffs have been owners of lots 3 and 4, bordering the Missouri river, since 1862. A bar began to form opposite these, near the middle of the stream, in 1857. Certainly, it had not appeared in 1856, as the ferryboat went directly across without obstruction. The following year a steamboat ran aground on the bar, and for several years afterward boats were compelled to avoid it by following the current on either side. As early as 1861, according to one of the plaintiffs, it was a half mile wide, and has been added to until it is now two to three miles long. By 1870 the northern part was overgrown with willows, and, though the main current of the river had gradually changed to the west of the bar or island, that part to the east was still fifteen or twenty rods wide, with a distinct current. Since then willow and cottonwood trees have sprung up on the bar, a small part was cultivated in 1878, and it has been occupied for agricultural purposes since 1886. During all these years alluvial deposits have been added to the north, south, and west. In 1870 accretions began to form on plaintiff's lots,

and this has been going on ever since. The water at ordinary stage continued to flow between plaintiffs' land and the island until about 1887, and it has run through a well-defined channel during the spring and June rise of the river up to the present time. Without setting out the evidence in detail, it is enough to say that the formation of the bar or island has been entirely distinct from any accretion to the shore. It arose near the middle of the river, though probably east of the thread of the then main current, without any connection with the Iowa shore, and was gradually added to by accretion or reliction until an island of the proportions mentioned was formed. Not only is this true, but the conclusion seems inevitable <sup>716</sup> from the circumstances shown that the additions to plaintiffs' land, whether from accretion thereto or the receding of the waters, have resulted from the formation of the island. Its existence undoubtedly changed the main current of the river, and by its growth to the northeast gradually cut off the stream formerly flowing between it and the shore. Whether this be true, however, need not now be determined. It is enough for the purpose of this case that the land beyond the channel last mentioned was formed independently of plaintiffs' land. It then never became part of their lots through the process of accretion or reliction.

2. But the appellants insist that, even if all we have said be true, yet are they the owners of the island. They argue that, as the state acquired title to the soil at the bottom of the river, as the latter receded toward Nebraska, it ought to be excluded from any claim to the part of the bottom abandoned; in other words, it seems to be thought that the state's title ought to be limited to the soil covered by the waters. And it is said that even though it may have owned the island when surrounded by water, that title moved from beneath it as the river receded, and the land became plaintiffs' as soon as connected with shore. It is conceded that no authorities have been found announcing such a doctrine, and we have been unable to discover any case awarding a riparian owner land because connected to his own, save when this has occurred through the imperceptible accretion or the reliction thereof by the gradual receding of the waters. The argument that this should be the rule, for that, while he may gain, he is equally likely to lose, is that on which ownership to the center of an unnavigable stream is grounded. And it may have had some influence in decisions declaring title in the riparian owner to the middle of a navigable stream above tide water: See *Morgan v. Reading*, 3 Smedes. & M. 366. No ques-

tion is made but the Missouri river at this point is a navigable stream, and that ordinarily <sup>717</sup> the riparian owner has no title beyond high-water mark: *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 Iowa, 199; *Tomlin v. Dubuque etc. R. R. Co.*, 32 Iowa, 106, 7 Am. Rep. 176; *Houghton v. C. D. & M. R. R. Co.*, 47 Iowa, 370; *Bennett v. National Starch Mfg. Co.*, 103 Iowa, 207, 72 N. W. 507. Nor is it doubted that title to the soil at the bottom of such a river from high-water mark to the middle of the channel is in the state: *Chicago etc. Ry. Co. v. Porter*, 72 Iowa, 426, 34 N. W. 286; *Pollard v. Hagan*, 3 How. 225; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838. As said in the last case: "Such title to the shore and land under water is regarded as incidental to the sovereignty of the state, a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery, and cannot be retained or granted out to individuals by the United States. Such title being in the states, the lands are subject to state regulations and control, under condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce." Contrary to the views of this court expressed in *Dunleith etc. Bridge Co. v. Dubuque Co.*, 55 Iowa, 558, 8 N. W. 443, the supreme court of the United States, in *Iowa v. Illinois*, 147 U. S. 1, 13 Sup. Ct. Rep. 239, laid down the rule "that the true line in navigable rivers between the states of the Union which separate the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each state extends to the thread of the stream; that is, to the mid-channel, and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed." As this island, then, was formed on the bottom of the river, connected in no way with the shores, it would seem that title continued in the state. It rests on soil which, when beneath the surface of the water, belonged to the state, and, if no longer its property, when was the title divested? The moment the bar appeared above the surface of the water? <sup>718</sup> If so, who acquired it? Surely not the plaintiffs, for at that time a stream forty or fifty rods wide separated it from their land. And its separation is still marked by a distinct channel to which the waters gradually receded up to 1887, and through which they still flow at the annual freshets. Nor do we think there is any ground for supposing title to shift as suggested. True, Lord Coke referred to what he designated a "movable freehold," as where the owner of the seashore



acquires or loses land as the sea recedes or approaches: See Kent's Commentaries, 11th ed., 547. In that sense title to land bordering the Missouri river may be said to be movable, for no one at night may safely predict what will be his boundary line the next morning. The state may lose part of the bottom of the stream by accretions to the riparian owner's land, or by reliction. But this is because it occurs through these processes, for the state is governed by rules applicable to the individual owner. That the state acquired title to soil at the bottom of the stream previously belonging to Nebraska or to private owners furnishes no ground for depriving it of the property it held. As well say, because of plaintiffs' acquiring a large body of land by accretions, they should be dispossessed of that previously owned, or divide it with adjoining owners to the east. The theory of appellants seems to be that, as they may be losers by a future change in the river, this land should be wrested from the state to compensate them for such possible loss. This would be robbing Peter to pay Paul. There is no more reason for saying the state loses title to an island when connected by accretions to the shore than to say title to an islet formed at one side of the thread in an unnavigable stream is lost when connected with another's land on the opposite side. The thought that title swims out from under an island as new bottom is acquired is not founded on any sound principle of reasoning. Title is never lost or found in any such evanescent manner. As said in *Benson v. Morrow*, 61 Mo. 347, the owner of contiguous land 719 is not "the owner of an island that springs up in the midst of the stream, whether the island be on one side or the other of the thread of the river. He goes only to the margin of the river. It would also logically follow that if, by accretions to such island, the water margin should unite with the shore, the newly made land would become a part of the island, and the riparian ownership would not be extended." In *Cooley v. Golden*, 117 Mo. 33, 22 S. W. 104, the same court, after referring to previous decisions declared that: "It makes no difference in principle that the islands in these cases had been surveyed and disposed of by the United States. The riparian owner would not take the accretion, for the reason that it was not added to his own land. Pole Island sprang up in the midst of the stream, far enough from the shore which bounded plaintiff's land to admit at times of the passage of boats between it and the shore. The banks of the island and that of the north shore of the river afterward united by accretions formed by the washings of the water, and plaintiff was

only entitled to such part thereof as was formed on his land." This was followed in *Perkins v. Adams*, 132 Mo. 131, 33 S. W. 778—a case in its facts much like the one at bar—where it is broadly stated that, if the disputed ground was "not formed to the land on the bank of the river by gradual accretions of the land thereto, or by gradual reliction of the adjoining bed of the river by the receding of the waters, then plaintiff is not entitled to recover, whether the land be called an island, or a sand bar, or other designation." The same principle is perspicuously stated by the court of civil appeals of Texas in *Victoria v. Schott*, 9 Tex. Civ. App. 332, 29 S. W. 681, which we quote with approval: "The uncontradicted evidence shows that the land thus claimed to be an accretion was formed in the stream as an islet, and that the stream for many years after its formation ran on each side of it. Four or five years since, the water receded from that <sup>720</sup> division of the bed which lay between the islet and plaintiff's land, and has, since such recession, flowed entirely through the channel east of the islet. Such recession did not change the title to the soil in the islet as it was before. Upon the formation of the islet, the title to it vested, and was not changed by the change in the river, as that was not a gradual and imperceptible accretion. The islet, when formed, was an accretion to the soil in the bed of the stream, and the owner of such bed became the owner of the accretion. In navigable streams the soil, and hence all islands formed upon it, belong to the sovereign." As announcing the same principle see *Morris v. Brooke*, 53 Am. Rep. 215, note; *People v. Warner*, 116 Mich. 228, 74 N. W. 705; *Bigelow v. Hoover*, 85 Iowa, 161, 39 Am. St. Rep. 296, 52 N. W. 124. See, also, *Indiana v. Kentucky*, 136 U. S. 479, 10 Sup. Ct. Rep. 1051.

3. The island did not pass under the swamp land grant, for it was not in existence at that time, and it was never a part of the government domain. As the plaintiffs acquired no interest in the land beyond what is called the "Iowa Channel," it is unnecessary to consider what title must be established in order to have it quieted. The decree of the district court was in harmony with these views, and is affirmed.

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**Island.**—A riparian owner on the bank of a navigable stream is not, by reason thereof, the owner of an island that springs up in the stream; and if, by accretion to such island, its water margin line unites with the main shore, the new made land becomes part of the island and not of the mainland, and the riparian ownership is not thereby extended: *Moore v. Farmer*, 156 Mo. 33, 79 Am. St. Rep. 504, 56 S. W. 493; *Glassell v. Hanson*, 60 Pac. 964. Compare the extended note to *Bellefontaine Imp. Co. v. Niedringhaus*, 72 Am. St. Rep. 282.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**KANSAS.**

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**J. B. WATKINS LAND MORTGAGE CO. v. MULLEN.**

[62 Kan. 1, 61 Pac. 385.]

**JUDGMENTS OF PROBATE COURTS—CONCLUSIVENESS OF—COLLATERAL ATTACK.**—A probate court has general jurisdiction over the estates of deceased persons. Its judgment in such matter is final unless corrected upon appeal, and is not subject to collateral attack.

**HOMESTEADS—PROBATE SALE OF—CONCLUSIVENESS OF.**—Although the national statute provides that no homestead acquired under it shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of patent, a judgment of a probate court ordering a sale of such homestead acquired under such law for the payment of debts contracted prior to the issuance of patent therefor is valid as against a collateral attack, unless the record of such judgment affirmatively shows that such debts antedate the patent.

Bishop & Mitchell and J. H. Mitchell, for the plaintiff in error.

H. E. Winterburn and J. W. McCormick, for the defendant in error.

<sup>2</sup> **DOSTER, C. J.** This is a proceeding in error from an order refusing to confirm a sheriff's sale of real estate and from an order setting aside the sale. It was first taken to the court of appeals. That court affirmed the judgment of the court below, and from that order of affirmance error has been prosecuted to this court.

Bridget O'Connor acquired title to the land under the homestead laws of the United States. She died. An administrator of her estate was appointed, who petitioned the probate court for leave to sell the land for the payment of debts. Due notice



of the application for leave to sell was given. The order to sell was allowed, the sale made to one S. J. Collins, and an administrator's deed executed to him. From him the land passed to one A. H. Teeter, who executed a mortgage upon it to secure a debt. This mortgage was foreclosed. At the foreclosure sale the plaintiff in error, the J. B. Watkins Land Mortgage Company, became the purchaser. The defendant in error, Mary A. Mullen, is an heir of the deceased Bridget O'Connor, and she interposed a proceeding to set aside the sale to the plaintiff in error, on the ground that the debts for the payment of which the land was sold were contracted prior to the issuance of the patent to it, and that consequently such sale and the title founded thereon were void under the United States homestead laws.

<sup>3</sup> It will thus be seen that the attack made upon the administrator's sale and deed is a collateral one. Can it be maintained? In our judgment it cannot, because the record in the probate court of the administration of the estate of Bridget O'Connor fails to show that the debts for which the land was sold were contracted prior to the issuance of the patent. The proof that was made as to the time the debts were contracted was made upon the hearing of the motion to confirm and the proceedings to set aside the sale, and not upon the hearing of the claims against the estate, nor upon the hearing of the application for leave to sell the land. The evidence offered in proof of the claims did not show when the debts were contracted, nor did the application of the administrator for leave to sell or the evidence in support of such application show when the debts were contracted. The language of the probate court granting the application for leave to sell negatives the idea that the debts to pay which the sale was ordered had been contracted before the issuance of the patent. The court, among other things, found that "the requirements of law and the orders of the court have been complied with." This, although general in terms and formal in language, is nevertheless, to the extent to which it should be taken into account on either side, a finding in opposition to the claim that the debts were contracted before the patent issued.

Section 2296 of the Revised Statutes of the United States reads as follows: "No land acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of the patent therefor." This section, as is seen, provides an exemption from

forced sale for the satisfaction of debts antedating the acquisition <sup>4</sup> of title by patent, and full effect has already been given to it by all the courts in cases where the claim of exemption was seasonably made: *Waples on Homesteads and Exemptions*, 926. Our attention has not been called to any decision on the effect of an inadvertent or erroneous judgment of a court of competent jurisdiction denying the claim of exemption, when such judgment was collaterally attacked, as was done in this case. Upon principle, however, we are fully persuaded that such judgment can only be reviewed upon appeal or other direct proceeding, and not in a collateral action. The general rule is that the judgments of courts of general jurisdiction, acting upon a subject matter within that jurisdiction, are conclusive until reversed or otherwise vacated by a direct proceeding brought therefor. In this respect there is no difference between courts of general jurisdiction over all matters and courts of general jurisdiction over a single subject matter. Though the jurisdiction be limited to a particular subject matter, yet if authority exists to do anything to that subject matter that can be done to it, the judgment of the court with respect to it is as conclusive as though pronounced by a court unlimited as to the list of things over which it may exercise jurisdiction.

Probate courts are everywhere courts of general jurisdiction over the estates of deceased persons, and almost everywhere a conclusive presumption of verity attaches to the record of their proceedings: 1 *Black on Judgments*, sec. 284. This view of the character of probate courts and the binding force of their adjudications has always been taken in this state. In *Shoemaker v. Brown*, 10 Kan. 383, it was said: "The probate court has jurisdiction to make final settlements with administrators. Its findings and <sup>5</sup> decisions upon matters within its jurisdiction are in the nature of judicial determinations, and cannot be impeached collaterally, except for fraud in obtaining the same."

In *Calloway v. Cooley*, 50 Kan. 754, 32 Pac. 376, this court, speaking of the power of the probate court in respect to the proof of wills, said: "Being vested with jurisdiction, its finding and determination are final, unless corrected upon appeal or proceedings in error, and are not subject to collateral attack." In *Proctor v. Dicklow*, 57 Kan. 119, 45 Pac. 86, it was said: "The adjudications of the probate court in a matter within its jurisdiction is as conclusive upon the parties as the judgment of the district court, and it should be allowed to stand unless set aside upon appeal or some direct attack." In *Keith v. Guthrie*,

59 Kan. 200, 52 Pac. 435, it was said: "The probate court is a court of exclusive jurisdiction over the distribution of the estates of deceased persons, subject to appeal to the district court. Its orders made in the exercise of its jurisdiction cannot be collaterally attacked and their effect frustrated by proceedings in other courts. . . . While probate courts are, in a sense, courts of inferior jurisdiction, they are not inferior in the sense that superior courts will ignore their judgments and orders, or undertake their correction otherwise than upon appeal or by other modes provided by statute."

In the opinion of the court of appeals a quotation is made from one of the notes in 12 American and English Encyclopedia of Law, first edition, 247, as follows: "There is a tendency in the later decisions in the United States to hold that jurisdiction is not only the power to hear and determine, but also the power to enter the particular judgment in the particular case." If by this is meant that when a court invested with general jurisdiction " over a particular subject matter wrongly applies the law to a proved or admitted state of facts its judgment is outside its jurisdiction and subject to collateral review, we unhesitatingly say that no such tendency is to be observed in the later decisions, because such a tendency, instead of modifying the general rule or introducing an exception to it, would go to its absolute subversion. It may be that some constitutional provisions are framed upon such high principles of natural right or public policy as to be beyond the power of the courts to misapply or wrongly interpret them; and, of course, a statute can be framed in such explicit and positive terms that a court disregarding its requirements would be held to have acted beyond its jurisdiction; but, generally speaking, when a court is invested with power, upon evidence, to determine a state of facts and declare the law applicable thereto, its decision, no matter how erroneous, is conclusive, unless the error of its judgment is apparent upon the face of its record. Herein, we think, lies the mistake of the court of appeals in this case. The time when the debts of Bridget O'Connor were contracted was a matter of evidence. The date of the land patent was likewise a matter of evidence. Presumptively, the probate court received evidence as to these two matters, and, presumptively, made its order for a sale of the land in view of the proved fact that the debts were contracted after the patent was issued. It had jurisdiction to hear this evidence and to determine these



matters, and its judgment, although erroneous in point of fact, is binding upon the interested parties.

A stronger case than this one in favor of the theory of the conclusiveness of the judgment of the probate court is *Wolfley v. McPherson*, 61 Kan. 492, 59 Pac. 1054. The question in that case was as to the erroneous <sup>7</sup> classification of a demand against the estate of a deceased person. In the opinion it was said:

"Counsel for defendant in error attempt to avoid the bar of the statute of limitations upon the theory that the original order of classification, being contrary to the statute, was void, and therefore, as a void judgment, it could be vacated at any time, under section 603. The judgment was not void. It was erroneous only. In *Gille v. Emmons*, 58 Kan. 118, 62 Am. St. Rep. 609, 48 Pac. 569, we held that 'a judgment entirely outside the issues in the case, and upon a matter not submitted to the court for its determination, is a nullity, and may be vacated and set aside at any time upon motion by the defendant.' That case, however, was entirely unlike this one. In that case a judgment was rendered in favor of a party upon a claim he had never made. In this case a judgment was rendered against a party upon a claim which she did make. In stating to the probate court the character of her claim she appropriated in her behalf the provisions of the law, assigning it to the second class. The jurisdiction of the probate court was thus invoked, not only as to the existence of the claim, but as to the priorities of classification to which it was entitled. The statute regulating the matter of classification is not plain. It required construction to ascertain its meaning, and this court, subsequently to the original order of classification made by the probate court, was called upon to construe it: *Cawood v. Wolfley*, 56 Kan. 281, 54 Am. St. Rep. 590, 43 Pac. 236. The mistake which the probate court made in construing it was an error only. Every question of law, as well as fact, was within its jurisdiction to determine. Its determination, though erroneous, was not void."

The writer of this opinion, who was also the writer of the one from which the above quotation is made, has some doubt, and at the time of that decision had some doubt, as to whether the doctrine in question was not pushed to an extreme in that case, but as to <sup>8</sup> its entire application to the facts of this case neither he nor his associates have any doubt.

Some courts have drawn a distinction between the records of so-called inferior courts which affirmatively showed jurisdiction

upon their face, and those which did not but were silent as to recitals of jurisdictional facts, holding that the former were conclusive as against collateral attack, while the latter were not. This distinction, we think, cannot be drawn in this state as to the judgments of probate courts. The decisions heretofore made as to the character of those courts and the effect of their records preclude us from viewing their judgments as otherwise than conclusive, unless the errors committed by them affirmatively appear on the face of their records. This we believe to be the general rule: 1 Black on Judgments, sec. 283.

"A court of record which has, by statute, all the power that any court could have over a certain subject of jurisdiction, especially if it be a subject of jurisdiction under the general rules of law or equity, is to be regarded (as to cases within that class) as a court of superior jurisdiction, within the rule which presumes the jurisdiction of such courts to render a particular judgment": *Stahl v. Mitchell*, 41 Minn. 325, 43 N. W. 385.

This doctrine was distinctly declared as to the judgments of probate courts in *Howbert v. Heyle*, 47 Kan. 58, 65, 27 Pac. 116, and *Bradford v. Larkin*, 57 Kan. 90, 94, 45 Pac. 69.

The judgments of the court of appeals and of the district court are reversed with directions to the latter court to proceed in the case in accordance with this opinion.

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Proceedings in Probate for the sale of a decedent's land are generally considered conclusive and immune from collateral attack: *Satcher v. Satcher*, 41 Ala. 26, 91 Am. Dec. 498; *Bradley v. Drone*, 187 Ill. 175, 79 Am. St. Rep. 214, 58 N. E. 304; *Neville v. Kenney*, 125 Ala. 149, 82 Am. St. Rep. 230, 28 South. 452. Compare *Smith v. Wildman*, 178 Pa. St. 245, 56 Am. St. Rep. 760, 25 Atl. 1047.

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## FITZWATER v. NATIONAL BANK OF SENECA.

[62 Kan. 163, 61 Pac. 684.]

**CORPORATIONS—STOCKHOLDERS' RIGHT TO INTERVENE.**—Corporation stockholders are entitled to defend legal proceedings in behalf of their corporation, if its directors or managing agents are willfully or fraudulently neglectful of its interests. The proper practice, in such case, is for the stockholders to move the court for leave to intervene in the suit they wish to defend, and to allege, and make a prima facie showing, that the authorized and managing agents of the corporation are derelict in their duties, and that they have a meritorious defense to the action.

S. K. Woodworth, for the plaintiff in error.

Wells & Wells and R. M. Emery, for the defendant in error.

<sup>163</sup> DOSTER, C. J. In this case proceedings in error have been instituted to reverse an order of the court below overruling the motion of certain stockholders in a banking corporation to intervene in a suit brought against their company and to defend the action against it. The grounds of the motion to intervene were that the company was not liable to the action brought against it, and that its directors and managing officers wrongfully and fraudulently refused to defend. The facts were that the State Bank of Seneca, a banking institution organized under the laws of this state, undertook to reorganize as a national bank in accordance with the provisions of the national bank act. That act provides that banking institutions organized <sup>164</sup> under state laws may reorganize as national banks upon a vote of two-thirds of the stockholders, upon the taking of which vote the board of directors are required to certify the action taken to the comptroller of the currency, who thereupon issues a certificate of authority to do business as a national bank. The decisions of the courts are that upon effecting the reorganization in the prescribed way the old corporation becomes merged in the new, or, more accurately speaking, the new corporation is held and treated to be a mere continuation of the old one. The change effected, therefore, merely consists in passing from one form of organization to another and in amenability to national regulation and control instead of that of the state.

The requisite number of the stockholders of the State Bank of Seneca voted to make the change. Whether the board of directors certified the resolution of reorganization to the comptroller of the currency does not appear from the record before us. However, it does appear that in due time the comptroller issued a certificate of authority to a bank entitled "The National Bank of Seneca," which institution commenced, and since then has continued to do, business by such title. In the main its stockholders were the stockholders of the old State Bank of Seneca, its directors were the same, with one or two additional persons, and its executive officers were the same. It commenced and has continued to do business at the place where the State Bank of Seneca was located. The officers of the old state bank, who, as just remarked, were also officers of the new national bank, continued to do business for the old bank and in



its name. This business, however, consisted in liquidating and winding up its affairs. It pursued the work <sup>165</sup> of collecting its securities and paying its obligations, and, among other things, made reports to the bank commissioner of the state.

It was unable to discharge all of its indebtedness, and to enable it to do so it borrowed twenty thousand dollars or more from the new national bank. It did not pay the money so borrowed, and suit was thereupon brought against it. It made default in the suit, whereupon certain of its stockholders who had not gone into the new or supposedly reorganized bank filed a motion to be allowed to defend in place of the corporation, alleging the lack of power of the old corporation officers to incur the obligations for which the suit was brought, that such obligations were given without consideration and in fraud of the old corporation and its stockholders, and that the officers of the old corporation, being the same as those of the new one and being the ones guilty of the wrongful acts charged, had neglected to defend as they should have done. In connection with the motion of intervention, the stockholders tendered a verified answer setting up all the matters herein briefly mentioned, and asked that they be allowed to file it and, under it, to be allowed to defend for their company.

The case was heard on the motion for leave to intervene and to file the answer. Considerable evidence was taken, much of which tended quite strongly to support the contention of the stockholders, especially to support their claim that the old state bank had, by process of reorganization, become changed into the new one. This claim was denied, it being asserted that, notwithstanding the resolution of the stockholders to reorganize, a reorganization was not in fact accomplished, but, instead thereof, the new bank was an original institution organized without reference to the existence <sup>166</sup> of the old bank. If such was the case, the old bank did not become merged into the new one, or changed to a new one, but retained its existence under the laws of this state and was competent to contract the obligations sued on. Seemingly, the only missing link in the chain of evidence necessary to show that the new bank was a reorganized, and not an original, institution was a showing that the board of directors of the old bank had forwarded the resolution of reorganization to the comptroller, and that the comptroller's certificate of authority had been issued in pursuance to such resolution, and not in pursuance of a scheme of original incorporation. The inference, however, is strong, from all the

evidence in the case, that the national bank was a reorganized, and not a newly organized, institution. However, if the record before us were the record of a final trial of the case, we would be compelled, under the well-settled rule, to allow the judgment of the court below to remain undisturbed; but the trial that was had was not a final trial, but only a trial of the motion for leave to intervene and have a trial. In other words, the trial that was had was not the trial proper, but was a trial of the preliminary question as to whether a trial should be had.

There can be no question but that stockholders are entitled to defend legal proceedings in behalf of their corporation in case its directors or managing agents are willfully or fraudulently neglectful of its interests: *Home Min. Co. v. McKibben*, 60 Kan. 387, 56 Pac. 756. In that case it was said: "If the directors be derelict in their duties, and through willful neglect or for a fraudulent purpose fail to protect the corporate interests, the stockholders may do so in their stead, but to entitle them to do so it <sup>167</sup> must be made to appear that the corporate officers who are primarily charged with the duty are willfully or fraudulently neglectful of it."

A proper practice in such cases is for the stockholders to move the court for leave to intervene in the suit they wish to defend, and to allege and show that the authorized and managing agents of the company are derelict in their duties. Before allowing this privilege to the stockholders, the court should require of them a *prima facie* showing, at least, but that showing need not be more than *prima facie* enough to enable the court to conclude that there are reasonable grounds to believe that the corporation defendant has a meritorious defense to the action against it and that its officers are fraudulently or improvidently neglectful of its interests. This showing was made in the case we are considering. Irrespective of the matters of fraud charged in the motion and answer, and to support which there was some showing of testimony, it would seem that if the National Bank of Seneca was the State Bank of Seneca reorganized, such last-named bank had no authority to contract the obligations sued on; rather, it had no existence, and, having no existence, the contracting of a debt cannot be predicated of it: *Smith Dig. Nat. Bank* Dec. 215. However, we do not wish to be understood as making such decision at this time. We only remark, as we did before, that such seems to the rule of the cases on the subject. If such be the law, there can be no question, unless some exceptional facts exist, that the old corporation had no

power to contract the obligations sued on, and the stockholders, therefore, would be justified in asking leave to defend. Hence, we are of the opinion, upon the showing made, that the court should have sustained the motion of intervention, should have allowed <sup>168</sup> the filing of the answer, and the making of an issue thereon, and should have allowed a full trial of the case.

To enable such to be done, the judgment of the court below is reversed.

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**Suit by Stockholder.**—The mere refusal of a corporation to bring a suit will not authorize any stockholder dissatisfied with its decision to himself institute an action. It must further appear that the refusal is wrongful: *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448. And it has been held that stockholders cannot maintain an action accruing to a corporation for breach of contract, which the directors refuse to bring: *Slattery v. St. Louis etc. Trans. Co.*, 91 Mo. 217, 60 Am. Rep. 245, 4 S. W. 79. See, further, *Johnson v. National etc. Loan Assn.*, 125 Ala. 465, 82 Am. St. Rep. 257, 28 South. 2; *Pencille v. State Farmers' etc. Ins. Co.*, 74 Minn. 67, 73 Am. St. Rep. 326, 76 N. W. 1026.

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## PORTSMOUTH SAVINGS BANK v. HARDMAN.

[62 Kan. 242, 61 Pac. 1131.]

**HOMESTEADS — EXTENSION OF MORTGAGE ON.**—A husband cannot, without the consent of his wife, extend the duration of a mortgage lien on their homestead.

I. E. Lloyd and F. D. Turch, for the plaintiff in error.

H. J. Harwi and W. M. Roberts, for the defendant in error.

<sup>242</sup> **PER CURIAM.** The question in this case relates to the effect on the homestead rights of a wife of an extension of the time of payment of a mortgage indebtedness on the homestead made by the husband alone, the legal title to the land being in his name. Was such an extension of time binding on the wife in respect to her homestead right, she not having been a party to it? Might she, upon the foreclosure of the mortgage, the time of payment of which had been thus extended, treat it as a new mortgage made without her consent, and might she also plead the statute of limitations to a foreclosure of it as though the time of payment had not been extended by her husband? The court of appeals held that the extended mort-



gage was void as to her, and that, conceiving it to be in effect the old mortgage, the statute of limitations was available as a defense to it. Our judgment accords with that of the court of appeals, though its reasons were not in all particulars what we might have given.

The judgment is affirmed.

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**A Mortgage on a Homestead** not signed by the wife is void: *Waterson v. E. L. Bonner Co.*, 19 Mont. 554, 61 Am. St. Rep. 527, 48 Pac. 1108. See, too, *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910; monographic notes to *Alt v. Banholzer*, 12 Am. St. Rep. 683-686; *Poole v. Gerrard*, 65 Am. Dec. 482-489; *Wilcox v. John*, 52 Am. St. Rep. 252-254.

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## IN RE CORUM.

[62 Kan. 271, 62 Pac. 661.]

**OFFICE AND OFFICERS—JUSTICE OF PEACE—POLICE JUDGE.**—Although the same person is prohibited from holding both the offices of justice of the peace and of police judge, yet if the police judge is absent, sick, or disqualified from acting, such justice may temporarily act as police judge until such absence or disqualification ceases.

**JUDGMENTS—COLLATERAL ATTACK—HABEAS CORPUS.**—Irregularities preceding a judgment rendered by a criminal or other court of competent jurisdiction cannot be collaterally attacked or corrected by a proceeding in habeas corpus.

**OFFICERS DE FACTO—COLLATERAL ATTACK.**—The acts and judgments of a de facto officer holding a de facto court are not void, and his title or right to the office is not subject to collateral attack.

Fairchild & Foley, for the petitioners.

G. L. Hay, for the respondent.

**271** JOHNSTON, J. C. C. Corum and W. O. Robinson were charged with selling goods in the city of Kingman without a license, in violation of a city ordinance, and upon a trial in the police court were found guilty. Failing to pay the fine imposed, they were taken into custody, from which they seek to be relieved by the writ of habeas corpus.

The petitioners attack the jurisdiction of the police judge because the complaint was sworn to and the warrant issued by S. T. Palmer, a justice of the peace, who **272** was acting police judge in the absence of Moses Waggoner, the regular police

judge. Attention is called to section 913 of the General Statutes of 1899 (Gen. Stats. 1897, c. 37, sec. 18), in which it is provided that no person shall hold the office of police judge and justice of the peace at the same time. Standing with that provision, and as part of the law relating to cities of the second class, is another provision that if the police judge be absent, sick, or disqualified from acting, a justice of the peace shall act as police judge until such absence or objection shall cease: Gen. Stats. 1899, sec. 993; Gen. Stats. 1897, c. 37, sec. 100. We think these provisions may be reconciled by interpreting the first to mean that a person holding the office of justice of the peace cannot be elected or appointed police judge; but if the police judge who has been elected or appointed be absent, a justice of the peace may be called in to act as police judge during his absence. In this view both provisions may stand and be given operation.

However, if the justice of the peace had been disqualified to act, it would not have invalidated the judgment that was subsequently rendered or justify the issuance of the writ. While the warrants were issued and recognizance taken by the acting police judge, the case was in fact tried, the judgment rendered and the commitment issued by Waggoner, who was regularly holding the office of police judge. The arrests were made without process, by officers in whose presence the offenses were committed, and hence the matter of the issuance of the warrants is of little consequence at this time. Irregularities preceding a judgment rendered by a court of competent jurisdiction cannot be corrected by a proceeding in habeas corpus. The police court had jurisdiction of the petitioners<sup>273</sup> and of the offense charged against them, and its judgment is not a nullity which can be collaterally attacked; and in such case the errors, if any were committed, must be corrected by an appeal.

Again, it is contended that as Waggoner had been appointed to fill a vacancy, and that, as there was no election for police judge at the ensuing election, the office became vacant, in the absence of an appointment subsequent to the election. It is unnecessary to consider whether an election should have been held, as Waggoner had been appointed, had qualified, and was in the actual and undisputed possession of the office. He was at least a *de facto* officer, holding a *de facto* court, and as such his acts were not void, and his title or right to the office was not subject to collateral attack: *State v. Williams*, 60 Kan. 837, 58 Pac. 476; *State v. Williams*, 61 Kan. 739, 60 Pac. 1050.

It is next contended by the petitioners that they were representing the L. B. Price Mercantile Company, of Kansas City, Missouri; that orders were taken by them which required the approval of the company before the transactions or sales were completed, and, therefore, that the business in which they were engaged was interstate, and not subject to local control or to a license tax. It may be remarked that neither the respondents nor the city claim that authority exists to impose a tax on interstate commerce. The ordinance in terms excludes business of that character from its operation, and the claim of the city was that the business which the petitioners were carrying on in Kingman, in part at least, was done within the state. We cannot go behind the judgment or open up and review the evidence on which the judgment rests. The city had authority to impose a license tax on <sup>274</sup> peddlers, and for that purpose an ordinance was passed, the validity of which is not assailed. The petitioners were charged with a violation of this ordinance before a court competent to try such violations. Upon a trial it was adjudged that the petitioners were guilty. The statute provides that no court or judge shall discharge a party held upon any process issued on any final judgment of a court of competent jurisdiction when the term of commitment has not expired: Gen. Stats. 1897, c. 96, sec. 91; Gen. Stats. 1899, sec. 4975. The record shows every necessary jurisdictional fact, and upon its face the judgment is valid. It appears that one of the defenses made before the police court was that the business was interstate, while the city made a contrary contention, and the court determined this question in favor of the city, and whether it decided it rightly or not under the testimony is not open to inquiry by habeas corpus: In re Black, 52 Kan. 64, 39 Am. St. Rep. 331, 34 Pac. 414; 9 Ency. of Pl. & Pr. 1046. If errors were committed in the proceedings in police court, or in the force and effect given the testimony before it, the remedy of the petitioners was an appeal to the district court. We think there is no credit in the claim that the city or its officers prevented the petitioners from taking an appeal, and upon the whole case we conclude that the relief asked must be denied.

The petitioners will be remanded.

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IN THE SUBSEQUENT CASE of In re Hewes, 62 Kan. 288, 62 Pac. 673, it was decided that the judgments of a judge pro tempore, elected by the members of the bar of the county as provided by statute, are not void because he failed to qualify by taking the



oath of office. Such judge is a de facto officer. As such his judgments are at most voidable, and are not subject to collateral attack.

Habeas Corpus is not an Appropriate Proceeding to review mere errors and irregularities in the judgment of an inferior court in a criminal case: *In re Fanton*, 55 Neb. 703, 70 Am. St. Rep. 418, 76 N. W. 447; *Ex parte Roberson*, 123 Ala. 103, 82 Am. St. Rep. 107 26 South. 645.

The Acts of de Facto Officers are valid, when they concern the public or third persons: *Farmers' etc. Bank v. Chester*, 6 Humph. 458, 44 Am. Dec. 318; *Wilcox v. Smith*, 5 Wend. 231, 21 Am. Dec. 213; *Oliver v. Mayor*, 63 N. J. L. 634, 76 Am. St. Rep. 228, 44 Atl. 709. Their validity cannot be attacked collaterally: *Cleveland v. McCanna*, 7 N. Dak. 455, 66 Am. St. Rep. 670, 75 N. W. 908.

The Title of an Officer de Facto cannot be attacked collaterally: *State v. Barnard*, 67 N. H. 222, 68 Am. St. Rep. 648, 29 Atl. 410.

## J. B. WATKINS LAND MORTGAGE CO. v. ELLIOTT.

[62 Kan. 291, 62 Pac. 1004.]

**CORPORATIONS, FOREIGN—JURISDICTION OF—SERVICE UPON.**—A loan corporation organized in one state, which makes its securities payable in another at a designated agency therein, and pays them there, appointing a trustee resident thereof to receive and hold such securities in trust for the payment of its obligations made payable there, and depositing its securities with the trustee for such purpose, is doing business in that state, and is subject to the jurisdiction of its courts by service of summons on its president or other managing agent casually found within such state.

A. C. Mitchell and S. D. Bishop, for the plaintiff in error.

W. W. Nevison and D. S. Alford, for the defendant in error.

<sup>291</sup> **DOSTER, C. J.** This was an action on a judgment rendered by a court of record of New York in favor of Cornelia U. Elliott against the J. B. Watkins <sup>292</sup> Land Mortgage Company. Judgment was again rendered in favor of Elliott, and from it error has been prosecuted to this court. The mortgage company is a loan corporation organized under the laws of Colorado. Suit was brought against it in New York and personal service of summons obtained on J. B. Watkins, its president. It made no appearance to the action, and judgment by default was rendered against it. The action in this state was on a transcript of such judgment. The defense was lack of jurisdiction of the court of New York over the person of the defendant. The ground of this claim was that the mortgage

company was a corporation foreign to New York, and therefore was not amenable to suit in that state unless it was doing business there. The contention was also made that the fact of the company's doing business in New York must affirmatively appear from the record sued on, which fact it was claimed did not appear from the record in question. These are likewise the contentions in this court.

We had occasion in *Mutual Reserve Fund Life Assn. v. Boyer*, 62 Kan. 31, 61 Pac. 388, to consider and announce our approval of the rule contended for by the plaintiff in error, viz., that a corporation of one of the states not doing business in another cannot be subjected to suit in such other state by the service of summons on one of its officers casually found therein. In that case we quoted from the authority upon which plaintiff in error in this case principally relies, to wit, *St. Clair v. Cox*, 106 U. S. 356, 1 Sup. Ct. Rep. 354, as follows: "We are of opinion that, when service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it <sup>293</sup> should appear somewhere in the record—either in the application for the writ or accompanying its service, or in the pleadings or the finding of the court—that the corporation was engaged in business in the state."

As likewise expressive of the rule, we also quoted from *Mora-wetz on Corporations*, section 980, as follows: "If a corporation is not engaged in trade and makes no contracts in a foreign state, justice seems to demand that it should not be subjected to suits in that jurisdiction; and it has been held, therefore, that under these circumstances the agents of the company have no authority to represent it in receiving service of writs or entering a voluntary appearance. Service of process upon the president or other managing agent of a corporation, while merely casually present in the jurisdiction of another state, does not constitute personal service upon the corporation itself."

It would appear, therefore, that the rule contended for is sound; but we are of opinion, however, that it does not apply to the case of the plaintiff in error, or, rather, that its case lies within the exception to the rule and not within the rule itself. The record sued on shows that it was making contracts and otherwise doing business in the state of New York. The action in New York, as shown by the transcript of judgment sued on, was on instruments called "real estate debenture coupon bonds." These bonds showed on their face that they belonged to a certain

designated series aggregating one hundred thousand dollars, all payable at the National Bank of Commerce, in the City of New York, and all secured by the assignment to and deposit with a trustee, to wit, the Farmers' Loan and Trust Company of New York, of an equal amount of real estate mortgages. And it was further specified in the bonds that they did not become obligatory <sup>204</sup> until the trustee had indorsed thereon a certificate of the fact that the specified amount of mortgage securities had been assigned to and deposited with it for the benefit of the holders of the debentures, in accordance with the terms of an agreement entered into between it and the mortgage company. In the case of the bonds sued on, the trustee had indorsed thereon the required certificate. We think this showed a doing of business, a making of contracts, by the mortgage company in the state of New York. The bonds were payable at a designated agency in New York. This involved a remittance of money to the agency to meet the obligations at maturity; it involved a contract of employment, an agency of the one party for the other; it involved an accounting between them; it involved the incurrence of a liability enforceable by the principal against the agent in New York.

The bonds sued on also showed the making of a contract of trusteeship in New York, enforceable in that state. The execution of this contract involved the placing of valuable securities under the protection of the laws of New York, and subject to the jurisdiction of the courts of that state. It involved relations between the creator of the trust, the trustee and cestui que trust, enforceable in the courts of New York. Now, the making of the several contracts and the creation of the several relations mentioned were all shown by the record of the case in New York sued on in this state, and therefore we are entitled to presume, as a consequence thereof, the execution of such contracts and the carrying on of such relations; that is, to presume the transaction of the business the parties agreed to conduct.

The statutes of the state of New York, introduced in evidence upon the trial of the action in this state, authorized <sup>205</sup> the service of process upon the president of a foreign corporation doing business in that state.

The plaintiff in error also raises a question of revivorship, which revivorship, as it says, was made necessary by the appointment of a receiver of its assets and to manage its affairs, and it also raises a question as to the validity of an attachment of some of its property on account of a contract between its cred-



itors to share equally and without preference in its assets. The first of these claims is unfounded; the other one is not in the case.

There is no error in the record, and the judgment of the court below is affirmed.

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IN THE CASE of Mutual Reserve Fund Life Assn. v. Boyer, 62 Kan. 31, 61 Pac. 387, cited in the principal case, it was decided, on the same authorities therein cited, that if a foreign life insurance company had at one time transacted business within the state under license duly issued, and filed as required by statute, and had also filed its written consent irrevocable to the institution of suits against it in the courts of the state, it is not liable to suit within that state on a policy of insurance issued in another state, if, prior to the issuance of such policy, it had been expelled or had withdrawn from and has entirely ceased to do business in, the former state.

**A Foreign Corporation is Doing Business in a state if it makes a single loan to a resident and takes therefor promissory notes secured by mortgage upon real property situate within the state:** State v. Bristol Sav. Bank, 108 Ala. 3, 54 Am. St. Rep. 141, 18 South. 533. Compare Florsheim Bros. Dry Goods Co. v. Lester, 60 Ark. 120, 46 Am. St. Rep. 162, 29 S. W. 34.

**Foreign Corporation—Process.**—If a foreign corporation falls to comply with the laws of a state, but is still engaged in business therein, its assent to service upon its managing agent is implied: Foster v. Betcher Lumber Co., 5 S. Dak. 57, 49 Am. St. Rep. 859, 58 N. E. 9. But so long as a corporation confines its operations to the state in which it was created, service cannot be had on its officers temporarily within another state: Crook v. Girard Iron etc. Co., 87 Md. 138, 67 Am. St. Rep. 325, 39 Atl. 94; Carstens v. Leidigh etc. Lumber Co., 18 Wash. 450, 63 Am. St. Rep. 906, 51 Pac. 1051.

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## TOWNSEND BRICK AND CONTRACTING COMPANY v. ALLEN.

[62 Kan. 311, 62 Pac. 1008.]

**MORTGAGES OF PROPERTY NOT IN POTENTIAL EXISTENCE.**—A mortgage on clay in the bank in its natural state, not severed or set apart in any manner, and upon the brick to be manufactured therefrom, is a mortgage upon property not having a potential existence, and is ineffectual to create a lien on the brick not manufactured nor in existence when the mortgage was executed.

H. E. Elliston, for the plaintiff in error.

Wollman, Solomon & Cooper, for the defendants in error.

**311** JOHNSTON, J. John W. Allen, James P. McGuire, John H. Barry, and T. J. Emlen, who owned six acres of land

near Atchison upon which there were machinery and appliances for the manufacture of vitrified brick, leased the same to John Gaffney for a term of one year at a stipulated rental, payable monthly. The instrument also provided that the lessors should have and retain a lien on the clay and material taken from the premises and upon the brick manufactured there to secure the payment of accrued and unpaid <sup>312</sup> rent. Gaffney at once entered into possession of the premises and manufactured large quantities of vitrified paving brick. On November 10, 1894, the T. B. Townsend Brick and Contracting Company purchased a large quantity of brick from Gaffney, including those in controversy, and immediately after the purchase took possession of the same. The rent due to the lessors had been paid down to and including the fourteenth day of October, 1894, and when the controversy arose between the lessors and the purchasers of the brick there was due from Gaffney to the lessors for rent the sum of two hundred and fifty dollars. The lessors, claiming the brick so purchased and taken possession of by the T. B. Townsend Brick and Contracting Company by virtue of the conditions and lien stated and given in the lease, brought this action to recover the value of the brick, and the trial court sustained the lien claimed by the plaintiffs and rendered judgment in their favor. The judgment was affirmed by the court of appeals, and the validity of the mortgage lien is again presented for consideration.

It may be assumed that the lease created a lien on any brick that had been made and were in existence when the lease was executed and filed in the office of the register of deeds; but can it be held to create a lien on brick made long afterward? None of the brick in controversy had been made when the lease was executed, and even the clay and shale from which brick were subsequently made were then in the bank and in a natural state. The face of the bank had been properly stripped, but before the clay used to produce the bricks in controversy had been reached, clay sufficient to make a million of bricks had been taken from the bank. The clay and shale in the bank have peculiar qualities necessary for the manufacture of <sup>313</sup> vitrified brick, qualities which ordinary clay does not contain, but no portion of the same which ultimately became an element in the brick in controversy was in any manner set apart by severance nor by the marking of the place from which it should be taken. There was no agreement nor was it in contemplation of the parties that any particular clay on the premises should be used,

but the lessee, Gaffney, had the right to take clay and shale for the purpose of making brick from any portion of the six acre tract leased to him. Certainly, the brick in controversy were not in actual existence when the chattel mortgage was made, and the clay and shale which entered into the manufacture of the same could not be identified in any manner.

The general rule is that no one can mortgage property which does not exist or which does not belong to him. It is true parties may make contracts with reference to after-acquired property which will be upheld as between themselves, but such contracts are not to be treated as chattel mortgages. The contention here is that the clay and shale used in producing the brick in controversy were in existence; that these constituted the principal elements which entered into the making of the brick in controversy; and therefore they had a potential existence to which the mortgage lien might attach. It is specifically agreed that the material out of which a thousand brick were made was only worth from twenty to thirty cents, while that amount of brick when completed was worth eight dollars. It is also agreed that the nature of the clay was so completely changed by the process of converting it into vitrified brick that it naturally would never return to its original condition. The attempt to give a chattel mortgage upon the clay in the bank was ineffectual, because there was no severance, no setting <sup>314</sup> apart by marking or otherwise, and being in its natural state it must be regarded as real estate, and we are of opinion that, under the authority of *Long v. Hines*, 40 Kan. 216, 10 Am. St. Rep. 189, 16 Pac. 339, the brick had no such actual or potential existence when the mortgage was made as to subject them to the lien of the same. In that case, it was held that a chattel mortgage on a corn crop to be grown in the future, but which had not been planted at the time of the execution of the mortgage, was void as against subsequent purchasers or attaching creditors, although the mortgagor was in possession of the land when the mortgage was executed.

While it is held that a valid mortgage may be given on a growing crop, the crop itself has a potential existence and will, in due course of time and nature, develop and mature; but a crop cannot be said to have an actual or potential existence merely because a person may have soil upon which to grow a crop or seed for that purpose. While the soil and the seed are essential, a crop cannot come into existence except by a new intervening act, and except with the assistance of other elements



and forces: *Cole v. Kerr*, 19 Neb. 553, 26 N. W. 598. So here, while the clay is an essential element in the manufacture of brick, the process of manufacture completely changes its form and character. The brick were not in existence when the mortgage was executed, and besides, they would never again become clay or return to the original condition. Other elements and forces were employed in the manufacture, so that the identity of the clay was entirely lost, and the product, as we have seen, is worth about forty times more than the clay which entered into it.

It is argued that because clay was the principal material from which the brick were made, and was in <sup>315</sup> existence, that the rule of *Long v. Hines*, 40 Kan. 216, 10 Am. St. Rep. 189, 16 Pac. 339, cannot apply. The mortgagor had the soil and seed in the case mentioned, which were the principal elements for the production of the crop, but the product was held not to have a potential existence; and for like reasons it must be held that the product, made largely from clay, had no such existence when the mortgage was made as to make it subject to the lien thereof. It having been held that the instrument was insufficient to constitute a lien on the brick in controversy, it is unnecessary to consider the points made with reference to the filing of the same in the office of the register of deeds.

The judgments of the district court and of the court of appeals will be reversed, and the cause remanded with directions to enter judgment in favor of the T. B. Townsend Brick and Contracting Company.

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**Mortgages of Property not in Existence** cannot, as a rule, be upheld or enforced in a suit at law: *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 486; *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 40 Am. St. Rep. 635, 37 N. E. 632. Compare *Hall v. Glass*, 123 Cal. 500, 69 Am. St. Rep. 77, 56 Pac. 338; *Donovan v. St. Anthony etc. Elevator Co.*, 7 N. Dak. 513, 66 Am. St. Rep. 674, 75 N. W. 809. See, further, the monographic notes to *Gregg v. Sanford*, 76 Am. Dec. 723-733; *Moody v. Wright*, 46 Am. Dec. 712-718.

**Sales of Property not in Existence** are discussed in the monographic note to *Forsyth Mfg. Co. v. Castlen*, 81 Am. St. Rep. 42-46.

[62 Kan. 327, 62 Pac. 1001.]

I agree to conditions named.  Purchaser's	<b>ATCHISON, TOPEKA &amp; SANTA FE RAILROAD COMPANY.</b>											
	<b>RETURN-TRIP COUPON.</b>											
	<b>Good for one first-class passage unless otherwise indorsed.</b>											
	<b>WICHITA TO WOODWARD, I. T.</b>											
	<b>When stamped by Company's agent and subject to the following contract:</b>											
In consideration of the reduced rate at which this ticket is sold, it is hereby agreed that it will not be good for going passage after midnight of the date named in attached coupon, nor for return passage after midnight of date punched in margin hereof, and that it is strictly non-transferable. Conductors will take it up and collect full fare if presented by other than the person whose signature is herein, or if more than one date is canceled, or if it shows alteration.												
Form —,                                  GEO. T. NICHOLSON, Local 3,                                General Passenger and Ticket Agent. Series 13.												
10453	Jan Feb Mar Apr O June July Aug Sep Oct Nov Dec											
	Day: 1 2 3 4 O 6 7 8 9 10 11 12 13 14 15 16											
	31 30 29 28 27 26 25 24 23 22 21 20 19 18 17											

She was told by the conductor that the time limit of the ticket had expired, and that she would have to get off at Derby, the next station. This she did under what the jury found to be "forcible persuasion." The petition of plaintiff in the court below alleged in general terms that she was rightfully riding on the defendants' train as a passenger for hire and entitled to be carried from Wichita to Woodward, Indian Territory; that she was directed and compelled, without right or justice, and against her consent, to leave the car and train, and was by the conductor negligently and wrongfully ejected therefrom, to her damage, etc.

On the trial Frank Price, a brother of plaintiff below, testified, over the objections of defendants, that he had purchased the ticket for his sister at Woodward, Indian Territory, for the round trip from the latter place to Wichita and return; that he had asked and paid for an unlimited ticket, and that he did not notice the punch marks thereon; that he saw it was from Woodward <sup>329</sup> and gave no more attention to it. There was no testimony showing that the witness Price, who bought the ticket, told his sister that the same was unlimited; and the jury, in response to a particular question of fact, answered that he did not inform her of the conversation had by him with the ticket agent at Woodward. Verdict and judgment were rendered for the plaintiff below, and the case was affirmed by the court of appeals.

Counsel for plaintiffs in error contend, and have cited many authorities to sustain their position, that the conductor must ascertain the rights of a passenger to travel from the ticket alone; that a ticket being presented to him which showed that a prior right of the passenger to travel had expired, he was fully justified in putting plaintiff off the train, and his justification exempted the company from liability; that the expulsion being rightful, if the plaintiff below had bought and paid for an unlimited ticket and was furnished a limited one by the agent of the company, her remedy was an action for breach of the contract to carry, and not in tort. This contention is combated by counsel for defendant in error, and many cases cited holding that while the conductor himself in such case may be exonerated from liability, the plaintiff having bought an unlimited ticket, the corporation is liable for her ejection from the train, notwithstanding the conductor had no other guide for his conduct toward the passenger than the language of the ticket, and that a recovery is not restricted to damages for breach of contract.



The cases are not at all harmonious on this question: 4 Elliott on Railroads, sec. 1594. In our view of the law applicable to the facts presented in the record, it is unnecessary to decide which side is right in its contention <sup>330</sup> on this question. The plaintiff below had the round-trip ticket in her possession for about five weeks, and within the limit of time stamped on the going part of the same she traveled from Woodward, Indian Territory, to Wichita. The time limits were plainly indicated on the ticket, and she was in no manner deceived as to its conditions, for nothing had been said to her intimating that when the ticket was purchased the agent of the company stated it was unlimited. She could have no grounds to doubt that the time limit expressed in the ticket was binding on her, and no reason whatever to believe that the conditions thereof had been waived by the company or its agent. The conductor also was in ignorance of any alleged contract or agreement different from that printed on the ticket.

Much stress is laid on the fact that the ticket was unsigned at the place left for signature on the margin. The following language printed thereon: "In consideration of the reduced rate at which this ticket is sold, it is hereby agreed that it will not be good for going passage after midnight of the date named in attached coupon, nor for return passage after midnight of date punched in margin hereof, and that it is strictly nontransferable. Conductors will take it up and collect full fare if presented by other than the person whose signature is hereon."

The evident purpose of requiring this ticket to be signed was to render it nontransferable and to identify the purchaser. The lack of a signature did not relieve the holder from an observance of that condition which required the ticket to be used for return passage before the date punched in the margin. In *Dangerfield v. Atchison etc. Ry. Co.*, 62 Kan. 85, 61 Pac. 405, it was said: "Limited round-trip tickets, like the one presented by *Dangerfield*, are in common use throughout the <sup>331</sup> country, and the conditions written upon the face of such tickets, and which constitute the contract between the parties, are not unreasonable or invalid. . . . Attention is called to the fact that the original purchaser did not sign the ticket when it was issued, but it is clear that his failure to sign did not eliminate the conditions of the contract. If these were binding upon the company, they were equally binding upon the pur-

chaser, whether signed by him or not. Nor does the fact that the first company omitted or dispensed with the signing of the ticket affect the right of the second company to insist on the conditions, and it did not make the ticket transferable": See also, *Hutchinson on Carriers*, sec. 575; 1 *Fett. Carr. Pass.*, sec. 285; *Quimby v. Boston etc. R. R. Co.*, 150 Mass. 365, 23 N.E. 205.

There is a distinction between tickets which are mere tokens or checks not purporting to be contracts between the carrier and the purchaser, but which only indicate the route over which the passenger is to be carried, and contract tickets like that in the present case. This difference was noted in *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665, wherein it was held that one who accepts a contract, and proceeds to avail himself of its provisions, is bound by the conditions and stipulations expressed in it, whether he reads them or not. In *Elliott on Railroads*, volume 4, in a note to section 1593, the following rule is deduced from numerous authorities cited: "We think that a ticket may be both a receipt and a contract, and, in so far as it is a contract, its terms should be held binding. Many of the cases above cited hold that a mere notice limiting liability or the like, printed on the ticket, is not binding because it is not a contract, but when shown to be part of the contract, if it is such as the law permits, we think it is binding, and there can, we think, be no doubt that such is the case as to terms and stipulations in the <sup>332</sup> contract part of the ticket, especially where it is signed by the purchaser."

In the same section, the following on the subject is said: "But the terms of the contract, or certain conditions and limitations which enter into and form part of the contract, are frequently written or printed on the face of the ticket, and where such is the case we think the better rule is that a passenger has no right to rely on the representations of an agent or conductor which are contrary to its express limitations and conditions."

In the case of *Kansas etc. R. R. Co. v. Rodebaugh*, 38 Kan. 45, 5 Am. St. Rep. 715, 15 Pac. 899, relied on by counsel for defendant in error, the loss of a passenger's baggage was involved. There was a declaration printed on the ticket, as follows: "None of the companies represented in this ticket will assume any liability on baggage, except for wearing apparel, and then only for a sum not exceeding one hundred dollars." There was a blank space for the purchaser's signature, but it was not filled. It was decided that the above

condition was not binding on the passenger. The language used is referred to in the opinion as a declaration of the company. It was merely an assertion on the part of the carrier—a proclamation that it absolved itself from liability for loss exceeding one hundred dollars. The case at bar is materially different. Here there was something more than a notice to the passenger that the ticket must be used within the limited time. The words used in the ticket in the present case were indicative of a contract between the parties regarding the time within which the ticket must be used: Elliott on Railroads, sec. 1593, and note.

It follows logically, when it is decided that the acceptance and use of such a ticket as that held by the defendant in error constituted a contract between her <sup>333</sup> and the carrier, that its positive terms, being expressed in writing, cannot be contradicted or varied by parol evidence. Nor can oral agreements relating to the subject expressed in the written ticket, made before or at the time it was issued, be received in evidence in contradiction of its stipulations. This is but the application of an old and well-settled rule of evidence: *Rodgers v. Perrault*, 41 Kan. 385, 21 Pac. 287; *Willard v. Ostrander*, 46 Kan. 591, 26 Pac. 1017, and cases cited. There is no ambiguity appearing in this contract of carriage, or the use of words having a doubtful meaning. So far as the knowledge of plaintiff below is concerned, it is not pretended that she, at any time prior to her alleged injury, had any other information regarding her rights as a passenger beyond those derived from the expressed stipulations of the ticket. The attempt, therefore, of the plaintiff below to impeach the written terms of the ticket by the parol testimony of her brother must fail of its purpose, and the testimony held to be inadmissible.

Holding this view of the case, it follows that the plaintiff below was not wrongfully put off the train. The judgment of the court of appeals and district court will be reversed, with directions to the latter court to enter judgment on the findings of the jury in favor of the defendants below.



**THE BINDING EFFECT OF CONDITIONS ON UNSIGNED PASSENGER TICKETS.****I. Tickets not Intended to be Signed by the Purchaser.**

- a. Inferior Tickets Given when First Class are Called for.
- b. Time Limitations on First-class Tickets.
- c. Notice of the Condition Must be Proved.
- d. Conditions Respecting Baggage.
- e. Tickets for Ocean Voyages.
- f. Tickets Issued at Special Rates.

**II. Tickets Intended to be Signed, or Which Have a Blank for the Passenger's Signature.**

- a. Failure of Passenger to Sign When There is a Blank Space for His Signature.
- b. Conditions in Passes not Signed by the Acceptors.
- c. Mileage Tickets Issued at Less than Regular Rates.
- d. Excursion Tickets Issued at Less than Regular Rates.
- e. Issuer of Ticket Cannot Take Advantage of His Neglect to Have Purchaser Sign It.

**I. Tickets not Intended to be Signed by the Purchaser.**

a. **Inferior Tickets Given When First Class Called for.**—The subject to be considered involves an examination of the decisions in reference, first, to those tickets which do not, on their face or otherwise, appear to be intended to be signed by the purchaser, and, second, to those which, from their form, were obviously intended to be so signed, but from which, through inadvertence or otherwise, the signature has been omitted. In cases of the first class the real question is whether or not the purchaser is chargeable with notice of the conditions printed upon his ticket, for if he be so chargeable, he is doubtless deemed to have accepted the ticket subject to the condition, unless it is one which the carrier, from considerations of public policy, was not permitted to exact, and, if exacted, not allowed to take advantage of. If a purchaser asks for a first-class ticket and is furnished one of an inferior grade through the fault of an agent of the carrier, such purchaser is, nevertheless, entitled to the advantages of a first-class ticket, and the carrier is liable for any damages which may result from refusing them: *Louisville etc. Co. v. Gaines*, 99 Ky. 411, 59 Am. St. Rep. 465, 36 S. W. 174.

b. **Time Limitations on First-class Tickets.**—There are some cases which maintain the broad proposition that if a purchaser pays for a first-class, unlimited ticket, he cannot be affected by conditions printed thereon containing limitations upon his rights as a first-class passenger with respect to the time within which the ticket must be used, nor, perhaps, in respect to any other right which he might reasonably suppose the ticket to guarantee. Thus, it is said in *Railroad v. Turner*, 100 Tenn. 213, 47 S. W. 223: "While there may be some uncertainty, and even conflict, in the authorities, we are of the opinion that the correct rule is, that a person who

purchases a general ticket and pays the usual price therefor is entitled to one passage, unlimited as to time, upon any train which, under the proper and usual schedules of the road, stops at the point of the passenger's destination. If a ticket, limited or conditional, is sold to a passenger, it can only be done upon an express agreement with him, either oral or in writing, and either based upon a consideration or with the alternative presented to the passenger of a full and unlimited ticket. A similar rule obtains in regard to contracts for the carriage of freight, and it has been held by this court that a carrier must hold itself in readiness to ship with common-law liability, and must offer to shippers a reasonable and bona fide alternative between that mode of shipment and one with a restricted or limited liability." In the same case it was further said: "We are also of opinion that the mere stamping or printing of a limitation or condition upon the back or face of a ticket and the acceptance of such ticket by a passenger, without more, is not sufficient to bind him to such condition or limitation, in the absence of actual notice to him of such condition or limitation and his assent thereto when he purchases his ticket. It cannot be presumed that every person buying a railroad ticket for ordinary and general use will, in the hurry and bustle of travel, stop to read and critically inspect his ticket. As a matter of fact, but little opportunity is afforded to him to do so. He generally takes his place in the crowd at the ticket window, produces and hands over his money, with a request of ticket to destination. His money is received. The ticket is produced, and, after being stamped, is handed to him through the ticket window. He has had no opportunity to see what is upon it, and has no time, in the rush, to stop and read and consider what may be printed or stamped on its face or back, and when he has paid full fare there is no occasion for his doing so, inasmuch as he can safely rely upon the contract which the law makes for him. Ordinary local tickets do not generally contain any terms of contract and are not intended to do so. They are mere tokens to the passenger and vouchers for the conductor, adopted for convenience to show that the passenger has paid his fare from one place to another, very much in the nature of baggage checks. The contract is, in fact, made when the ticket is purchased, and if it is different from what the law would imply, it must be so stated and assented to when the ticket is delivered. Nor will the posting of notices in the waiting-rooms, ticket offices, and on the cars affect purchasers with notice in such cases. Passengers have but little time or opportunity to read such placards, and it would impose quite a serious burden upon travel to hold that the public must read all these notices thus posted before taking passage on a train upon which they are willing to and do pay full fare." In harmony with this opinion is that of *Boyd v. Spencer*, 103 Ga. 828, 68 Am. St. Rep. 146, 30 S. E. 841.

Where the limitation upon the ticket is one with respect to the time within which it may be used, some of the American courts hold that the purchase and use of such ticket constitute an acceptance of its terms, including the limitation upon the time of its use, and that the carrier may rightfully refuse to honor it afterward, though it was not issued at any special or reduced rate, and there is nothing entitling it to be regarded a special ticket except the time limitation contained therein: *Hanlon v. Illinois C. R. R. Co.*, 109 Iowa, 136, 80 N. W. 223; *Coburn v. Morgan's etc. R. R. Co.*, 105 La. 398, 83 Am. St. Rep. 243, 29 South. 882.

**c. Notice of Condition Must be Proved.**—Perhaps the decisions cited refusing to enforce time conditions on first-class tickets mean no more than that it must appear that the purchaser had notice of, and therefore accepted, the conditions printed upon his ticket. With this limitation, we think the decisions are sound and in harmony with the weight of the most recent authority upon the subject. It is true that in England, in 1869, Chief Justice Cockburn in one case said: "However harsh it may appear in practice to hold a man liable by the terms and conditions which may be inserted in some small print upon the ticket, which he only gets at the last moment, after he has paid his money and when, nine times out of ten, he is hustled out of the place at which he stands to get his ticket by the next comer—however hard it may appear that a man shall be bound by conditions which he receives in such a manner, and moreover when he believes that he has made a contract binding upon the company to take him, subject to the ordinary conditions of the general contract, to the place to which he desires to be conveyed—still we are bound on the authorities to hold that when a man takes a ticket with conditions in it, he must be presumed to know the contents of it, and must be bound by them": *Zunz v. South Eastern etc. Co.*, L. R. 4 Q. B. 544; 38 L. J. Q. B. 209, 20 L. T., N. S., 873. In 1879, the question was presented in the house of lords whether a passenger was bound by conditions printed on the back of his ticket exonerating the carrier from liability for loss of baggage. Lord Chelmsford referred to the opinion of Chief Justice Cockburn, from which we have just quoted, and expressed anxiety to be referred to the authorities which had influenced the judgment of the lord chief justice, and said that, though numerous authorities had been cited, none of them had gone to the length of establishing a presumption of assent to the condition upon the ticket, and he asserted that assent was a question of evidence, "and the assent must be given before the completion of the contract. The company undertakes to convey passengers in their vessels for a certain sum. The moment the money for the passage is paid and accepted, the obligation to carry and convey arises. It does not require the exchange of a ticket for the passage money, the ticket being only a voucher that the money has been paid. Or, if a ticket is necessary to bind the company, the moment it is delivered the



contract is completed before the passenger has had an opportunity of reading the ticket, much less the indorsement. It may be a question whether if a passenger were to read the indorsement and decline to agree to the terms, the company could refuse to take him as a passenger. Holding themselves out as undertaking to convey passengers by their vessels, it might be held that they are bound to carry upon the terms of their common-law liability alone, unless a special contract be entered into with the passenger. But it is unnecessary to consider this point." All the judges agreed that the carrier was not exonerated from liability in this case, there being nothing to show that the passenger knew of or assented to the condition printed on the back of the ticket: *Henderson v. Stevenson*, L. R. 2 H. L. S. 470; 32 L. T., N. S., 769; *Steers v. Liverpool etc. Co.*, 15 Am. Rep. 457.

Two English cases sometimes cited as indicating that a passenger is bound by conditions printed on the back of a ticket on examination appear to be limited to tickets issued by a railway company not as carriers, but as warehousemen, in receipt of goods to be kept by them until called for: *Harris v. Great Western etc. Co.*, 1 Q. B. Div. 515; 45 L. J. Q. B. 729; 34 L. T., N. S., 647; 25 Week. Rep. 63; *Parker v. South Eastern etc. Co.*, L. R. 2 C. P. D. 416; 46 L. J. Com. P. 468; 37 L. T., N. S., 540; 25 Week. Rep. 564.

In *Richardson v. The Lord Gough S. Co.*, L. R. [1894] App. Cas. 217, a passenger had obtained a ticket which on its face purported to be subject to numerous conditions, among which was one limiting the liability for loss of, or injury to, the passenger or his luggage to the sum of one hundred dollars. The jury found that the passenger knew that there was writing or printing on the ticket, but did not know that the writing or printing contained conditions relating to the terms of the contract of carriage, and that the carrier did not do what was reasonably sufficient to give notice of the conditions. In the house of lords judgment in favor of the passenger was sustained. The principal opinion was delivered by Lord Chancellor Herschell, in the course of which he said: "My lords, the only question that now comes before this house is whether there was any evidence to go to the jury upon which they could properly find the answer that they did to the last two questions. Now, what are the facts, and the only facts, bearing upon this question which were proved before the jury? That the plaintiff paid the money for her passage for the voyage in question, and that she received this ticket handed to her folded up by the ticket clerk, so that no writing was visible unless she opened and read it. There are no facts beyond those. Nothing was said to draw her attention to the fact that this contract contained any conditions; and the argument of the appellants is, and must be, this, that when there are no facts beyond those which I have stated, the defendants are entitled, as a matter of law, to say that the plaintiff is bound by these conditions. That, my lords, seems to me absolutely in the

teeth of the judgment of the court of appeals in *Parker v. South Eastern Ry. Co.*, 1 Com. P. 618, 2 C. P. D. 416, with which I entirely agree; nor does it seem to me consistent with the case of *Henerson v. Stevenson*, L. R. 2 H. L. S. 470, in your lordship's house, when that case is carefully considered." The English cases may, therefore, be regarded as affirming that it must be left to the jury to determine, as a question of fact, whether the purchaser of a ticket had notice of the conditions and limitations stated therein, and if they find that he had not such notice, then that he is not bound, nor the carrier relieved from liability thereby. Where, however, a railway ticket was issued in coupons inclosed within the outside cover of a paper book, on the outside of which was printed "Cheap return ticket London to Paris and back, second class," and inside of the cover statements were printed "that the cover without the coupons, or the coupons without the cover, are of no value," and that "each company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats in consequence of passengers being booked to travel over the railway of other companies." The holder of a ticket was injured while traveling in France through the negligence of a railway and its servants, and brought an action against the original carrier in England, where the ticket was sold, and on the trial he gave evidence to the effect that he had never read and did not know of the condition of the ticket. The court said that the contract consisted of the whole of the little book, all the leaves of which were to be made use of before the contract could be completed, that the passenger could not make use of the first coupon without having his eyes upon the condition, and the fact of his not having read the ticket or book in its entirety could not relieve him from the consequences of the condition: *Burke v. South Eastern etc. Co.*, L. R. 5 C. P. D. 1; 49 L. J. Com. P. 107; 41 L. T., N. S., 554; 28 Week. Rep. 309. We may well doubt whether this decision is in harmony with that in the case last referred to which, both from the lateness of its date and the paramount authority of the court, must be controlling.

**d. Conditions Respecting Baggage.**—In the United States the cases relating to this question are mainly those relating to the liability of a carrier for the loss of baggage when he seeks exemption because of some condition or limitation to be found either on the baggage check or the ticket which the passenger purchased. As a matter of fact, the ticket is usually purchased and the contract between the carrier and the intending passenger perfected before the delivery of any baggage check, and where such is the case, we should not expect that a condition found upon such check should be treated as varying the contract already made, and in a few cases coming within our observation in which the condition relied upon was printed on the baggage check, it has not been regarded as sufficient to relieve the carrier from liability, where there was no evidence that the passenger assented thereto: *Mobile etc. Co. v.*

Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Indianapolis etc. Co. v. Cox, 29 Ind. 360, 95 Am. Dec. 640; Malone v. Boston etc. Co., 12 Gray, 388, 74 Am. Dec. 598; Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701. Generally, the same result has been reached though the condition or limitation relied upon was contained in the ticket purchased by the passenger, unless he knew at the time of such purchase, or at all events, at or before the time of entering upon his journey, that his ticket contained the restriction relied upon, no presumption arises against him from the purchase and use of such ticket that he knew of, or assented to, any limitation upon the ordinary common-law liability of the carrier: Mauritz v. New York etc. Co., 23 Fed. 765; Potter v. The Majestic, 60 Fed. 625; Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Southern Express Co. v. Purcell, 37 Ga. 103, 92 Am. Dec. 53; Georgia R. R. Co. v. Gann, 68 Ga. 350; Kansas City etc. R. R. Co. v. Rodebaugh, 38 Kan. 45, 5 Am. St. Rep. 715, and note, 15 Pac. 899; Brown v. Eastern R. R. Co., 11 Cush. 97; Steers v. Liverpool etc. Co., 57 N. Y. 1, 15 Am. Rep. 453; Baltimore etc. R. R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617; Kent v. Baltimore etc. R. R. Co., 45 Ohio St. 284, 4 Am. St. Rep. 539, 12 N. E. 798; Ranchau v. Rutland R. R. Co., 71 Vt. 142, 76 Am. St. Rep. 761, 43 Atl. 11; Wilson v. Chesapeake etc. R. R. Co., 21 Gratt. 654.

**e. Tickets for Ocean Voyages.**—In the case of voyages across the ocean, it is said to be presumed that tickets are purchased with more deliberation than for by railway, and hence if the carrier issues what is commonly called a contract passenger ticket, containing limitations which the passenger purchased and used, he is presumed to have known of, and accepted, such conditions, and to be bound thereby: The Kensington, 88 Fed. 331; Fonseca v. Cunard S. S. Co., 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665; Steers v. Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453; O'Reagan v. Cunard S. S. Co., 160 Mass. 356, 39 Am. St. Rep. 484, 35 N. E. 1070.

**f. Tickets Issued at Special Rates.**—Where a ticket or other evidence of the passenger's contract is issued at less than first-class rates, and he is aware of this fact, there is no doubt that it becomes his duty to inquire in what respect his contract differs from that implied by the ordinary first-class ticket, and that this duty should be pursued at least to the extent of reading the ticket and the conditions printed or written thereon or therein. In such a case the difference between the price charged him and that which would have been exacted for a first-class unconditional ticket is presumed to be an adequate consideration for any reasonable and lawful condition which may be exacted of him. There is no dissent from the proposition that under such circumstances he is bound by the conditions on his ticket, whether or not he has read it or is otherwise informed respecting them. Whether, when both the seller and the purchaser are silent respecting the character of the ticket sold, any presumption arises that the latter knew, or is chargeable with no-



tice, that the ticket was sold to him at less than the price of a first-class unconditional ticket, we do not know. All we can assert with confidence is, that if he does know that he is receiving the ticket for less than the regular rates, he is charged with the duty of inquiry, concerning its conditions, and is bound by them: *St. Louis etc. Ry. Co. v. Weakley*, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134; *Bissell v. New York C. R. R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369; *Kimball v. Rutland etc. R. R. Co.*, 26 Vt. 247, 62 Am. Dec. 567; *Ranchau v. Rutland R. R. Co.*, 71 Vt. 142, 76 Am. St. Rep. 761, 43 Atl. 11. In such cases the ticket constitutes the contract between the passenger and the carrier, and the conditions and limitations thereon must be held to be impliedly known and assented to by the passenger when he has paid for such ticket less than the usual and regular unlimited fare. When tickets are sold at reduced rates, as such tickets uniformly are, it has been very wisely said that the purchaser should, in consideration of such reduced fare or greater privileges, expect and look for some conditions, limitations, and terms different from those attaching to tickets generally, and be on his guard to become informed of them.

## II. Tickets Intended to be Signed, or Which Have a Blank for the Passenger's Signature.

a. **Failure of Passenger to Sign When There is a Blank Space for His Signature.**—The great majority of all passenger tickets issued at reduced rates contain stamped or printed limitations and conditions followed by a blank space for the name of the purchaser to be signed by him, either as an assent to such conditions or as a means of identification, or as both, and it is almost uniformly held that the purchaser of such ticket is conclusively presumed to have known and consented to such conditions, whether he signed the ticket at the time of purchase or not. Such ticket, when accepted by the purchaser, constitutes a written contract, the terms of which cannot be altered by parol evidence, in the absence of fraud, although the ticket is unsigned: *Abram v. Gulf etc. Ry. Co.*, 83 Tex. 61, 18 S. W. 321; *Gulf etc. R. R. Co. v. McGown*, 65 Tex. 640-643; *Gregory v. Burlington etc. R. R. Co.*, 10 Neb. 250, 256, 14 N. W. 1025; *Quinby v. Boston etc. R. R. Co.*, 150 Mass. 367, 23 N. E. 205; *Rahilly v. St. Paul etc. R. R. Co.*, 66 Minn. 153, 68 N. W. 853; *Drummond v. Southern Pac. R. R. Co.*, 7 Utah, 118, 25 Pac. 733. This doctrine has been applied to a round-trip excursion ticket in *Dangerfield v. Atchison etc. Ry. Co.*, 62 Kan. 85-88, 61 Pac. 405, where the court said: "Attention is called to the fact that the original purchaser did not sign the ticket when it was issued, but it is clear that his failure to do so did not eliminate the conditions of the contract. If these were binding upon the company, they were equally binding upon the purchaser, whether signed by him or not." Again, in *Gregory v. Burlington etc. R. R. Co.*, 10 Neb. 250, 4 N. W. 1025, the court said: "But in this case the right of the plaintiff to enforce the contract springs from the consideration

which he paid. He took the ticket subject to the conditions expressed on its face whether he signed the same or not." The case of *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665, involved the rights of a passenger under an accepted ticket known and styled as a "passenger contract ticket," containing numerous provisions respecting the rights of the passenger, among which was one declaring that the carrier did not hold itself liable for loss, detention, or damage to baggage, and the court held that a passenger who accepted such a ticket, consisting of two large pages, signed by the carrier, and with a blank space for the signature of the passenger, thereby assents to the provisions, conditions, and limitations printed on the ticket, and is bound by them, whether he reads them or not, and although he does not sign the ticket. To the same effect is *The Kensington*, 88 Fed. 331. In neither of these cases does it appear that the ticket was issued to the purchaser at less than the regular rate.

b. **Conditions in Pass not Signed by the Acceptor.**—A person accepting and traveling upon a free pass with certain conditions upon it must be deemed to have accepted it upon such conditions, whether he reads and signs them or not: *Quimby v. Boston etc. R. R. Co.*, 150 Mass. 365, 23 N. E. 205; *Gulf etc. R. R. Co. v. McGown*, 65 Tex. 640. In *Quimby v. Boston etc. R. R. Co.*, 150 Mass. 365, 23 N. E. 205, the court said: "When the plaintiff received his injury, he was traveling upon a free pass given him at his own solicitation, and as a pure gratuity upon which was expressed his agreement that in consideration thereof he assumed all risk of accident which might happen to him while traveling on or getting on or off the trains of the defendant railroad corporation, on which the ticket might be honored for passage. The ticket bore on its face the words, 'provided he signs the agreement on the back hereof.' In fact, the agreement was not signed by the plaintiff, he not having been required to do so by the conductor, who honored it as good for the passage, and who twice punched it. The fact that the plaintiff had not signed it, and was not required to sign it we do not regard as important. Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not: *Squire v. New York Central R. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162; *Hill v. Boston etc. R. R. Co.*, 144 Mass. 284, 10 N. E. 836; *Boston etc. R. R. Co. v. Chipman*, 146 Mass. 107, 4 Am. St. Rep. 293, 14 N. E. 940. The object of the provision as to signing is to furnish complete evidence that the person to whom the pass is issued assents thereto, but one who actually avails himself of such a ticket and of the privilege it confers to secure a passage, cannot be allowed to deny that he made the agreement expressed therein, because he did not, and was not, required to sign it: *Gulf etc. R. R. Co. v. McGown*, 65 Fed. 640-643; *Illinois Cent. R. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260; *Wells v. New York Cent.*

R. R. Co., 24 N. Y. 181; Perkins v. New York Cent. R. R. Co., 24 N. Y. 196, 82 Am. Dec. 282."

c. **Mileage Tickets Issued at Less than Regular Rates.**—A person who attempts to ride upon a mileage ticket, issued at less than the regular mileage rates, and violates the conditions printed thereon, is not entitled to relief on the ground that the ticket was unsigned, or that it has not been signed by him. Thus, in *Rahilly v. St. Paul etc. R. R. Co.*, 66 Minn. 153, 68 N. W. 853, it appeared that the defendant company issued a mileage ticket to a purchaser which expressly provided that it was to be used only by the purchaser "whose signature appears on the last page," and also that it was subject to the conditions named in the contract and made a part thereof. One of these conditions was that the ticket was nontransferable, and if presented by any other than the original holder, "whose signature is hereon," the conductor would take it up and collect full fare. The ticket was never signed by the original purchaser. The plaintiff purchased the ticket from a broker and presented it in payment of his fare on one of defendant's trains. The conductor took it up, and refused to return it to the plaintiff, who refused to pay his fare, and the court held that he was not entitled to ride on the ticket, and the fact that it was not signed was immaterial, since by accepting the ticket he accepted all the terms and conditions therein contained. Also that plaintiff had no right to refuse to pay his fare unless the conductor would return such ticket. A similar case sustaining the same ruling is that of *Comer v. Foley*, 98 Ga. 678, 25 S. E. 671, and *Drummond v. Southern Pacific Co.*, 7 Utah, 118, 25 Pac. 733.

d. **Excursion Tickets Issued at Less than Regular Rates.**—The same rule applies to excursion tickets sold at less than regular rates. The conditions named therein are binding upon the holder of such ticket. Thus, the right to return passage upon such ticket conditioned upon its presentation to the agent at the going destination, its dating and stamping by him and the affixing of the signature of the plaintiff to a printed statement on the back of the ticket, as evidence that he was the original purchaser, is reasonable, and is a condition precedent to plaintiff's right to return passage. If such ticket is not thus dated, stamped, and signed, the conductor to whom it is presented for return passage is not called upon to investigate as to the identity of the passenger, who must either pay fare other than the ticket or submit to leave the train: *Edwards v. Lake Shore etc. R. R. Co.*, 81 Mich. 364, 21 Am. St. Rep. 527, 45 N. W. 827; *Louisville etc. R. R. Co. v. Wright*, 18 Ind. App. 125, 47 N. E. 491; *Abram v. Gulf etc. R. R. Co.*, 83 Tex. 61, 18 S. W. 321; *Bowers v. Pittsburgh etc. R. R. Co.*, 158 Pa. St. 302, 27 Atl. 893; *Western Maryland R. R. Co. v. Stocksedale*, 83 Md. 245, 34 Atl. 880.

If a person claims the right to travel as a passenger on a commutation ticket, on the ground that he is one of the members of a partnership named on the face of the ticket, he must show the



conductor, by signing his name or otherwise, that his name appears indorsed thereon, in compliance with the conditions specified in the contract on the reverse side of the ticket: *Granier v. Louisiana etc. R. R. Co.*, 42 La. Ann. 880, 8 South. 614.

In *Dangerfield v. Atchison etc. R. R. Co.*, 62 Kan. 85, 61 Pac. 405, it appeared that a person procured the return portion of a round-trip excursion ticket from a broker at the point of destination, upon which was printed a condition that it could be used only by the original purchaser, who must sign the ticket and identify himself at the point of destination before beginning the return passage. The ticket had not been signed by the original purchaser, and the broker signed the second purchaser's name on the ticket delivering it to his purchaser who entered upon the return journey. The first conductor to whom it was presented accepted the ticket for passage, but the second conductor discovered that the holder was not entitled to ride on the ticket, took it up, and upon the refusal of the passenger to pay fare, compelled him to leave the train, and it was held that the passenger, not being the original purchaser, nor having complied with the conditions printed upon the ticket, which were reasonable, was not entitled to ride on the ticket and was rightfully ejected from the train upon refusal to pay fare.

In a similar case it was again held that the fact that the ticket was not signed by the original purchaser can make no difference, since the purchaser in accepting the ticket, where the contract is set out in full, accepts the terms of the contract, and is bound by them. The court in this case said: "But it is contended that the ticket agent sold without requiring the purchaser to sign the contracts. We think this makes no difference. He took them at a price less than the regular fare." The terms of the contracts are set out in full, and we think by accepting the tickets without signing, he accepted the terms of the contract, and was bound by them: *Drummond v. Southern Pac. R. R. Co.*, 7 Utah, 118-121, 25 Pac. 733.

**e. Issuer of Ticket Cannot Take Advantage of His Neglect to Have Purchaser Sign It.**—A carrier of passengers, as well as the passenger, is generally bound by the conditions printed upon an unsigned passenger ticket. Thus, if a railroad ticket provides that when presented to the conductor the passenger shall sign his name thereto and "otherwise identify" himself as the original purchaser, the conductor is not entitled, after the passenger has offered to sign the ticket, to refuse such offer and to require the passenger to "otherwise identify" himself, and to eject him from the train for refusing to do so, and the company, upon ratifying the act of the conductor, is liable to the passenger in exemplary damages: *Norfolk etc. R. R. Co. v. Anderson*, 90 Va. 1, 44 Am. St. Rep. 884, 17 S. E. 757. In speaking of the passenger in this case, the court said: "Where his offer to identify himself in the only mode specifically stipulated was rejected he was warranted in refusing to do more. Had he been permitted to sign his name, and had the conductor,

upon examining the signature, been left in doubt as to the sufficiency of the evidence, he might then have required any additional evidence of identity that was reasonable. But when he arbitrarily refused to receive the evidence, which it was his primary duty to have accepted, accompanying his refusal, as he did, with gross insult to the plaintiff, which was afterward repeated, he had no right to require the plaintiff to 'otherwise identify' himself. He had no right, in other words, to repudiate a part of the contract, and to require the plaintiff to comply with the residue": *Norfolk etc. R. R. Co. v. Anderson*, 90 Va. 7, 44 Am. St. Rep. 886, 17 S. E. 757. In *Kent v. Baltimore etc. R. R. Co.*, 45 Ohio St. 284, 4 Am. St. Rep. 539, 12 N. E. 798, the facts were that a railroad company sold and delivered a thousand mile ticket to a purchaser who paid a reduced rate therefor in ignorance of a printed condition thereon, that "conductors will not honor this ticket unless properly stamped and signed by the purchaser, and will strictly enforce the above conditions." The company instructed its agents, and the uniform custom regulating the sale of such tickets required, that the purchaser sign certain conditions printed on the ticket before delivery to him. The ticket in question was delivered to the purchaser and several times honored by the company's agents, and conductors without requiring him to sign the conditions, and the court held that the company thereby waived such requirement, and its conductor was not justified in ejecting the purchaser from a train by reason of his refusal to sign the ticket or to pay the usual fare in money for his proposed passage. The court said: "The contract between Kent and the railroad company was made when he bought his ticket, received and paid for it. Neither party could after that change its terms, or impose new conditions upon its enforcement without the consent of the other. According to the company's instructions to agents, and by uniform custom regulating the sale of such tickets they were required to be signed before their delivery to the purchasers. The company saw fit, in the case at bar, to dispense with this requirement. It received the plaintiff's money, delivered him the ticket, in his ignorance of the request that he sign it, and honored it for several trips without first requiring him to sign its conditions. It thereby waived this requirement, and its conductor was not justified, while it still retained plaintiff's money, in ejecting him from its cars by reason of his failure to sign the ticket which had already gone into full effect between the parties, and his failure to pay the usual fare in money for a passage which was already paid for": *Kent v. Baltimore etc. R. R. Co.*, 45 Ohio St. 288, 4 Am. St. Rep. 539, 12 N. E. 798. In *Gregory v. Burlington etc. R. R. Co.*, 10 Neb. 250, 4 N. W. 1025, it was shown that an excursion ticket was bought by a person without express knowledge that it contained a printed condition that it was to be used only by the purchaser, who was to sign his name thereto whenever requested to do so by conductors, and it was held that the posses-

sion of such a ticket was prima facie evidence of ownership and that the failure of the holder to sign his name to the contract on the ticket, there being no evidence of a request for him so to do, did not invalidate the ticket, as the signature was merely a mode of identifying the purchaser. In such case the mere fact that the ticket is unsigned does not justify a conductor in compelling the holder thereof to leave the train upon his refusal to pay full fare in money: *Gregory v. Burlington etc. R. R. Co.*, 10 Neb. 250, 4 N. W. 1025.

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## WILLIAMS v. HUTCHINSON & SOUTHERN RAILWAY COMPANY.

[62 Kan. 412, 63 Pac. 430.]

**EMINENT DOMAIN.—JUDGMENT CREDITORS ARE NOT OWNERS** within the meaning of statutes relating to condemnation proceedings.

**EMINENT DOMAIN.—JUDGMENT LIENS.**—A judgment is a statutory lien only. It is within the power of the legislature to modify or abolish such lien before rights become vested under it. It may be superseded by statute authorizing the taking of the land under condemnation proceedings, on payment of compensation to its owner, and when the proceedings are completed and the compensation paid an easement is acquired free of all judgment liens.

**EMINENT DOMAIN.—WAIVER OF PREPAYMENT OF COMPENSATION.—ESTOPPEL.**—If prepayment of compensation for property taken under condemnation proceedings is waived by the owner of the land, and a railway company, relying upon such waiver, proceeds to build its road and expends large sums of money on such land, the owner thereof is estopped to reclaim the land or maintain ejectment therefor.

G. A. Vandever and D. H. Martin, for the plaintiffs in error.

A. A. Hurd, W. Littlefield, and O. J. Wood, for the defendant in error.

**412 JOHNSTON J.** This was ejectment, brought by L. T. Williams and F. L. Martin to recover from the Hutchinson & Southern Railway Company a strip of land one hundred feet wide through a farm in Reno county, and which has been occupied by the railway company as a right of way for its railroad since 1889. While **413** Benjamin Blanchard owned the land, and in April, 1888, a judgment was obtained against him which became a lien thereon. An execution sale of the land to satisfy the judgment was made on March 6, 1894, to W. H. Crawford, who conveyed the land to F. L. Martin in August, 1894, and Martin in turn conveyed an undivided one-half interest in



the same to L. T. Williams on July 26, 1898. On these proceedings and transfers Williams and Martin base their claim to the land in controversy. The railway company founds its right to the strip of land, which it has occupied as a right of way for the past eleven years, upon condemnation proceedings and the payment of the award to the owner of the land. The plaintiffs challenge the validity of the condemnation proceedings and of the easement acquired by the railway company. The proceedings to condemn the land were instituted May 16, 1889, and the commissioners awarded for the value of the land taken and damages the sum of three hundred and seventy-nine dollars and eighty cents, but the money so awarded was not paid to the county treasurer within ninety days after the filing of the report of the commissioners, nor until April 8, 1893. The delay in the payment of the award was occasioned by an agreement between the railway company and the owner of the land that payment need not be made until the owner demanded it.

The trial court, upon the facts presented, rightly held that ejectment could not be maintained, and gave judgment for the defendant. The judgment creditor had no title to or estate in the land when the condemnation proceedings were had, and, within the meaning of the statute regulating such proceedings, he was not an owner: *St. Louis etc. R. R. Co. v. Wilder*, 17 Kan. 239; *Goodrich v. Commissioners of Atchison Co.*, 47 Kan. 355, 27 Pac. 1006; *Rand v. Ft. Scott etc. Ry. Co.*, 50 Kan. 114, 31 Pac. 683; *Chicago etc. Ry. Co. v. Sheldon*, 53 Kan. 169, 35 Pac. 1105; *Wichita etc. R. R. Co. v. Thayer*, 54 Kan. 259, 38 Pac. 266. Under the decisions cited, it was held that a mortgagee who had a specific lien upon the land condemned was not an owner of the land nor of an estate therein, and that railroad companies, by condemnation proceedings, obtained an easement free from the lien of the mortgage. A judgment is a statutory lien only, and it is within the power of the legislature to abolish the lien before rights become vested under it. It was held in *Watson v. New York Cent. R. R. Co.*, 47 N. Y. 157, that a provision causing a judgment lien which had not ripened into a title to be superseded by taking land under condemnation proceedings, on payment of compensation to the owner of the land, is valid, and that, when the proceedings are concluded and compensation paid to the owner, the company acquires the easement free from all judgment liens: *Gimbel v. Stolte*, 59 Ind. 416; *Lewis on Eminent Domain*, sec. 325; *Mills on Eminent Domain*, sec. 74. The payment of just compensation to the owner is a

condition precedent to obtaining any easement in the land, and, as against the owner, the proceedings prescribed by statute must be valid.

The proceedings in the present case appear to have been regular and sufficient, except that payment of the award was not made within the time prescribed by the statute. The condition of the prepayment of compensation, however, being for the benefit of the owner, he may waive it; and if he does expressly or by clear implication waive prepayment or allow the damages to remain a debt, and the railroad company, relying on the waiver, proceeds to build its road and expend large sums of money on the land, the owner <sup>415</sup> is estopped to reclaim the land or to maintain ejectment for its recovery. In *Knapp v. McAuley*, 39 Vt. 275, it was held: "Where the owner of land across which a railroad has been surveyed and located consents that the contractors of the road may proceed on the land before his damages are paid, and under an agreement that they shall be subsequently ascertained and paid, and the land is thereupon taken possession of by the railroad company, and the road constructed over it, the title to the land passes, and the owner retains no lien upon it for his damages, but must look for payment to the party to whom he gave credit": *New Orleans etc. R. R. Co. v. Jones*, 68 Ala. 48; 10 Am. & Eng. Ency. of Law, 2d ed., 1144.

Under the authorities cited, it was competent for the owner to enter into an agreement waiving and postponing the payment of the award, and certainly when the money was paid to and received by the owner the condemnation proceedings were complete, and all question of title under the proceedings was set at rest. Payment had been made and accepted by the owner before the sale of the land upon execution, and the title of the railroad company was complete long before the purchaser at the execution sale obtained a title to the land. When the sale was made, the railway company had been in possession of the land for about five years, and had expended thousands of dollars in the construction of its road on the strip in controversy. The owner of the land would be estopped to claim that the proceedings were void because the money was not paid within the time provided by statute, and those who had no title or interest in the land in controversy when the payment was made and title completed were certainly in no condition to maintain ejectment for a recovery of the <sup>416</sup> land. Whatever rights the plaintiffs might have had as against the fund paid, they have no right to recover the land at this late day. For more than nine years

before this proceeding was begun the railway company had entered upon the land, constructed its road at great expense, and had continuously operated the same; and under such circumstances even an owner of the land, if no damages had been paid, would be regarded as having acquiesced therein, and would be restricted to a suit for damages.

In our view, the condemnation proceedings were sufficient to give an easement to the railway company, and therefore the judgment in favor of the defendant must be affirmed.

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**The Lien of a Judgment on Lands** does not constitute, in law, per se, a property or right in the land itself: *Young v. Templeton*, 4 La. Ann. 254, 50 Am. Dec. 563; *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429. The judgment creditor acquires no estate or interest in the property: *Davis v. Ownsby*, 14 Mo. 170, 55 Am. Dec. 105.

**Railroad—Right of Way.**—The owner of land taken for a railroad cannot maintain ejectment therefor after the road is constructed, upon his failure to obtain payment of damages, where he has acquiesced in the occupation of the land without prepayment of such damages under an agreement for a future payment thereof by the company: *McAulay v. Western Vt. R. R. Co.*, 33 Vt. 311, 78 Am. Dec. 627. Compare *Daniels v. Chicago etc. R. R. Co.*, 35 Iowa, 129, 14 Am. Rep. 490; and see *Florida Southern R. R. Co. v. Hill*, 40 Fla. 1, 74 Am. St. Rep. 124, 26 South. 566.

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## STATE v. GILLESPIE.

[62 Kan. 469, 63 Pac. 742.]

**LARCENY—POSSESSION OF STOLEN GOODS.—DECLARATIONS OF A PERSON IN POSSESSION** of stolen goods explaining such possession, made immediately upon their discovery in his possession, are part of the *res gestae*, and admissible in evidence upon the trial for the larceny though self-serving.

**LARCENY—POSSESSION OF STOLEN GOODS—PRESUMPTION OF GUILT.**—Mere possession of goods recently stolen from a burglarized house is not of itself evidence tending to show, as matter of law, that the possessor is guilty of the larceny; nor is mere possession, in connection with other criminating circumstances, sufficient, as matter of law, to show guilt, or even raise a presumption of guilt of either the larceny or the burglary.

**LARCENY—POSSESSION OF STOLEN GOODS—EXPLANATION—PRESUMPTION.**—The possession of goods recently stolen from a burglarized house, to constitute evidence tending to show guilt of the larceny, or to be sufficient in connection with other criminating circumstances, to raise a presumption of guilt of the larceny and the burglary, must be unexplained, because it is only the unexplained recent possession of stolen goods that authorizes an inference of guilt.



Branine & Branine, for the appellant.

A. A. Godard, attorney general, and J. J. Hildreth, county attorney, for the state.

<sup>469</sup> DOSTER, C. J. This is an appeal from a judgment of conviction of the offenses of burglary and larceny concurrently committed. The store of one C. J. Gram, in Halstead, Harvey county, was broken into in the nighttime and some articles of fruit and confectionery <sup>470</sup> stolen. Suspicion of the crime fell upon the appellant, Taylor Gillespie, a boy aged about seventeen, who with two sisters resided on the outskirts of the town. A few mornings after the commission of the burglary, Gram, the store proprietor, and one Philbrick, a constable, called at the appellant's house to search for the stolen property. After an explanation by these men of the object of their visit the boy left, and remained away about an hour, during which time some of the goods in question were found in the house. When he returned and learned that the goods had been found he explained that one Ike Thompson had brought them to him and left them in his keeping; or, rather, to state the fact more accurately, he testified in his defense on the trial that Thompson had brought them to his house and left them in his charge, and he offered to testify, and likewise to prove by Gram and Philbrick, that he so stated to them immediately on his return to his house and on being informed of the discovery there of the goods. This offered evidence of the explanation given by him was rejected by the court and its rejection has been assigned as error. We are quite well assured that it was error.

The general rule is that declarations made by a party concomitantly with the performance of an act by him, and of a nature to explain and characterize it, constitute a part of the act itself. The act and the accompanying declaration together constitute the *res gestæ*, and are both admissible in evidence. This rule is too familiar to require the citation of authorities in order to the understanding or enforcement of it. It may be remarked, however, by way of illustration of its application to particular cases, that it is not limited to instances of self-disserving <sup>471</sup> declarations, but extends as well to declarations self-serving in character. "It makes no difference, so far as the admissibility of the declaration is concerned, whether it be in favor of or against the party making it. If the act is one of alleged criminality, and the accompanying declaration tends to show it to be innocent, it is equally admissible as where the tendency is to show the

criminality of the act; and it may be given in evidence by the defendant as well as by the state": *Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22.

In further illustration of the rule, it may be also remarked that it is not limited to declarations accompanying the performance of acts by a party, but applies as well to declarations explanatory of existing facts with which a party stands in immediate personal relation. Declarations *res gestæ* are not merely declarations accompanying acts performed, but they are also declarations concomitant with present facts. The test of their admissibility is spontaneity of utterance. If they appear to be the instinctive, unpremeditated speech of the party in immediate causal relation to the thing in question, they are admissible, whether that thing be an act concurrently performed or a fact concurrently existing, or whether it be inculpatory or exculpatory in character or import. Declarations of this kind explanatory of the possession of stolen property fall entirely within the rule, and their admissibility has been fully authorized by the courts and text-writers. Bishop, in his *Criminal Procedure*, volume 2, section 746, says: "The discovery of the stolen goods in the possession of the defendant being a fact in the case the doctrine of the *res gestæ* teaches that what was said in connection with this fact—that is, with the discovery—may in <sup>472</sup> general be admitted in evidence on either side; especially where, at the time of such discovery, he is directly or by implication charged with the theft. For example, his explanation of how he came by the goods, and the like, may be testified to as well in his behalf as against him. And if such explanation appears to the jury reasonable, and it is not shown by the prosecutor to be false, its weight in the scale for him will be very considerable; but, if it appears unreasonable, and especially if it is shown to be false, it will bear against him heavily."

Some of the cases most clearly in point are *People v. Dowling*, 84 N. Y. 478; *Henderson v. State*, 70 Ala. 23, 45 Am. Rep. 72; *Mitchell v. Territory of Oklahoma*, 7 Okla. 527, 54 Pac. 782.

It is not improbable that the court below ruled against the introduction of the offered testimony because the explanation made by the defendant was not given upon the instant of the first imputation against him of guilty possession of the goods. Some of the testimony might furnish a justification for this view, but other parts of it do not. It was not so stated by the court as the ground of the ruling made. It was not pressed upon us by counsel for the state but was only casually suggested

by them and, therefore, we have not critically examined all of the evidence to see whether such may not have been the reason for the court's decision. In fact, it would seem difficult to determine the relation, in point of time and other circumstances, between an accused person's knowledge of a criminating fact and his explanation of it, when the privilege was denied him of testifying what his explanation was and the time he made it with relation to his knowledge of the exculpatory circumstance.

Upon the subject of the presumption arising from <sup>473</sup> the possession of recently stolen property the court instructed as follows: "The possession of recently stolen goods, taken on the occasion of a burglary, is evidence tending to show the guilt of the possessor, and may, when taken in connection with other criminating circumstances, raise a presumption of guilt sufficient to warrant a conviction of both burglary and larceny."

In *State v. Powell*, 61 Kan. 81, 58 Pac. 968, the question of the presumption arising from the possession of recently stolen goods taken on the occasion of a burglary was given consideration. In that case the court below had instructed that the unexplained possession of recently stolen property was prima facie evidence of the guilt of the larceny, and when burglary was charged in connection with the larceny, and the larceny could not have been effected without the commission of the burglary, the possession of the stolen property was also prima facie evidence of the burglary. This instruction was held to be erroneous, because of the failure to include "other criminating circumstances" than the possession of the stolen property as necessary to raise the presumption of guilt of burglary. As to the conditions under which a presumption of guilt of burglary as well as larceny arises, the instruction of the court in this case omitted the statement of one of the essential facts justifying the presumption. That was the lack of explanation of the defendant's possession of the property. The court instructed that possession of recently stolen property, taken on the occasion of a burglary, was evidence tending to show the guilt of the possessor, and that, of course, meant his guilt of both burglary and larceny, because they were both charged in the information and were both the subjects <sup>474</sup> of investigation; and the court also instructed that such possession, in connection with other criminating circumstances, might be sufficient to raise a presumption of guilt of both burglary and larceny. Now, the unexplained possession of property recently stolen from a burglarized house may be evidence tending to show guilt of both offenses, but it cannot



be that the mere possession of recently stolen property is, as matter of law, evidence tending to show the possessor to be guilty of the larceny, because, if such be the case, it might tend so strongly to show guilt as alone to justify conviction.

Nor do we think that, as matter of law, the mere possession of goods recently stolen on the occasion of a burglary may be sufficient, even in connection with other criminating circumstances, to raise a presumption of guilt of the burglary. The difference in strength and cogency between evidence tending to show guilt and evidence sufficient to raise a presumption of guilt is not great enough, if it exists at all, to justify the drawing of distinctions between the rules applicable to the two states of moral conviction they generate. As just remarked, evidence tending to show guilt may tend so strongly to show it as to raise a presumption of guilt, and a presumption of guilt, if not rebutted, is sufficient to convict of crime. It is the unexplained possession of recently stolen goods that tends to show guilt or raises a presumption of guilt of the larceny, and it is the unexplained possession of goods recently stolen on the occasion of a burglary that tends to show guilt or raises a presumption of guilt of the burglary. In the case of *State v. Powell*, 61 Kan. 81, 58 Pac. 968, the instruction held to be erroneous was not criticised because lack of explanation by the possessor of the stolen goods was not included <sup>475</sup> among the conditions giving rise to the presumption of guilt. In fact, in that case lack of explanation was distinctly included among the elements of the presumption, so far as the larceny was concerned; the instruction was held to be erroneous because the court had ruled that the possession of property recently stolen on the occasion of a burglary was sufficient, without other criminating circumstances, to raise the presumption of guilt of the burglary. The instruction might have been criticised because of its failure to include lack of explanation as one of the necessary additional criminating circumstances but the question in the case was not what particular circumstances should accompany the possession of the goods in order to raise the presumption, but it was whether mere possession, without any other circumstance, was sufficient; hence it did not become necessary to consider lack of explanation by the possessor of the goods as a condition giving rise to the presumption. However, it is quite apparent that the opinion in that case proceeded upon the assumption that the law required lack of explanation of the possession of stolen goods taken from a burglarized house to constitute an element necessary to show

guilt or to raise a presumption of guilt of both offenses because, among other things, it was remarked: "It has been frequently held in this state that such possession unexplained is prima facie evidence of larceny." And again: "We do not feel warranted in still further extending the presumption that the evidence is of itself sufficient, if unexplained, to warrant a conviction for burglary."

We think the rule stated by us obtains generally in the other states. In *Orr v. State*, 107 Ala. 35, 18 South. 142, the court said: "Whenever there is evidence tending to explain the possession, it is error to charge the jury 'that recent <sup>476</sup> possession of stolen property is prima facie evidence of guilt,' without the qualification 'unexplained.' The words 'may be' should be used in the place of the word 'is.' It is the 'unexplained' recent possession of stolen property that authorizes the inference of guilt. Whether the explanation offered is credible or satisfactory is a question for the jury." See, to same effect, *Blaker v. State*, 130 Ind. 203, 29 N. E. 1077; *Robb v. State*, 35 Neb. 285, 53 N. W. 134.

Other claims of error are made, but we do not consider them well founded; but, for the errors above pointed out, the judgment of the court below is reversed and a new trial ordered.

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**Larceny.**—Possession of stolen property as evidence of larceny is the subject of the monographic note to *Hunt v. Commonwealth*, 70 Am. Dec. 447-452. Such possession must be recent after the theft in order to impute guilt to the possessor: *Williams v. State*, 40 Fla. 480, 74 Am. St. Rep. 154, 25 South. 1034. In *State v. Guild*, 149 Mo. 370, 73 Am. St. Rep. 395, 50 S. W. 909, it is said that recent possession of stolen property is evidence either that the person in possession stole the property or that he received it knowing it to be stolen, according to the circumstances, and, unexplained, is sufficient to warrant a conviction.

## KANSAS NATIONAL BANK v. BAY.

[62 Kan. 692, 64 Pac. 596.]

**NEGOTIABLE INSTRUMENTS—PERSONAL LIABILITY OF ATTORNEY IN FACT.**—A person who signs a note in the name of another, by himself as attorney in fact, with the knowledge of the payee, and subsequent indorsee that he has no authority to use such other's name, and who refuses to assume personal responsibility by signing his own name, is not liable on the note as his contract, although it is given in a transaction of his own, and he generally uses the name signed to the note as trade name.

Houston & Brooks, for the plaintiff in error.

H. Whiteside, for the defendant in error.

**692** **DOSTER, C. J.** This was an action by the Kansas National Bank against C. M. Bay on a promissory note. Judgment went for the defendant. The plaintiff has prosecuted error to this court. The note sued on read as follows:

"\$5577.50.                      Wichita, Kansas, October 8, 1898.

"One hundred and twenty days after date, I promise to pay to the order of W. W. Graves & Co. five thousand five hundred and seventy-seven and 50-100 dollars, for value received, negotiable and payable, without defalcation or discount, at the Kansas National Bank of Wichita, Kansas, with interest at the rate of 10 per cent per annum from November 8, 1898, interest payable annually. No. —. Due Feb. 8, 1898.

"H. R. SLOAN.

"By C. M. BAY,

"Attorney in Fact."

**693** The petition averred that the defendant Bay, under the name and style of H. R. Sloan, executed and delivered the note, and that the amount of it was due from the defendant Bay, doing business as H. R. Sloan; wherefore judgment was demanded against said Bay.

The facts were that Bay was doing his own business under the name of Sloan, and that, as a cover for his transactions, he had procured a power of attorney from Sloan. However, that instrument did not confer on him the power to execute promissory notes. He bought cattle from W. W. Graves & Co., and, to evidence the purchase price, executed to them two promissory notes, in form similar to the one in suit. To secure these notes, he executed in Sloan's name a first and a second chattel mort-



gage on the cattle. These notes and mortgages were negotiated to the Kansas National Bank. At the time they were taken by the bank, Bay explained to its president that he was doing business in the name of Sloan under a power of attorney. The bank accepted the notes and mortgages, but required Bay to furnish it with a copy of the power of attorney. The cattle seemingly were taken under the first mortgage to pay one of the notes. This left the other one in the hands of the bank. It was held there as collateral security to an indebtedness due the bank from Graves & Co. The bank desired its renewal and sent Graves, as its agent, to procure the renewal. As a renewal, Graves secured the note in suit and indorsed it to the bank. He tried to induce Bay to assume personal responsibility on the note by signing his own name to it. Bay refused to do this.

There is no question but that the transaction for which the notes were given was Bay's individual business,<sup>694</sup> but he fully explained to the bank president and to Graves & Co. that he was not doing business in his own name; that he could not do so because of indebtedness held against him. There is no claim of deception or fraud practiced by Bay. His admission that he was conducting his own business in the name of another and his reasons for doing so were frank and open. While he seemed to be of the opinion that Sloan's power of attorney to him authorized the execution of promissory notes, yet it was not claimed that he fraudulently misstated his authority under that instrument, and, even if he had done so, the bank came into the possession of a copy of the power of attorney before the note in suit was executed, and therefore knew what it contained or did not contain. The question, therefore, is whether Bay is liable on the note executed by him in the name of Sloan.

The plaintiff in error contends that Bay is liable, because, as it says, the name of Sloan was a trade name adopted by Bay for the transaction of his own business, and, inasmuch as the giving of the note was his own business, he is liable on it as though executed in his own name. There are authorities to the effect that one who, for his own purposes, adopts the name of another, will be held liable in a transaction of his own conducted thereunder. We have no occasion to question the soundness of these authorities. We think, however, that they are limited to cases where it appeared that, under the name of another as a trade name, the party contracted to bind himself and not the other; and, in some of them, the party using the name of another was held liable, not on the contract, but upon the transaction out

of which the contract grew. It may be that Bay is liable in an action charging him upon the original transaction, but he is <sup>695</sup> not liable upon the promissory note. He is not liable because he never made that note his contract. He never agreed to be bound upon it, but, on the contrary, refused to sign it as his contract or bind himself by it as an instrument of writing.

No cases precisely in point have been cited to us, nor in considerable research among the authorities have we been able to find one entirely similar in its facts. We think, however, that the case is covered by the general principles of the law, and that these are well stated and elucidated in *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240, the opening paragraph of the opinion in which case reads: "It is well settled that any person taking a negotiable promissory note contracts with those only whose names are signed to it as parties, and cannot, therefore, maintain an action upon the note against any other person. That rule, of course, does not preclude charging a party who, instead of the name by which he is usually known, signs, with intent to bind himself thereby, his initials, or a mark, or any name under which he is proved to have held himself out to the world and carried on business."

The judgment of the court below is affirmed.

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One who Signs a Fictitious Name to a Note, or the name of a real person without authority, is not liable thereon: *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240.

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## PRICE v. FIRST NATIONAL BANK.

[62 Kan. 735, 64 Pac. 637.]

**JUDGMENTS—MERGER.**—All causes of action upon which suit is brought and final judgment obtained are merged in such judgment, and thereby extinguished and cannot be made the basis of a subsequent action or judgment.

**JUDGMENT—MERGER OF ONE IN ANOTHER.**—A second judgment upon the same cause of action as a prior judgment, although for a less amount, is a waiver of the balance, and an absolute extinguishment of the first judgment.

**JUDGMENTS—MERGER—EFFECT OF SECOND JUDGMENT.**—If a judgment is recovered upon a prior judgment, the latter is merged in the former, and all of its liens or priorities are released.

**JUDGMENTS.—SATISFACTION, MERGER, OR EXTINGUISHMENT** of a personal judgment in an action to foreclose a real estate mortgage, releases the mortgage lien.

On July 10, 1890, J. M. Price and wife executed two notes for five thousand dollars each, for an indebtedness due the defendant bank. They also executed to one D. Auld a deed to certain real estate in trust as security for the payment of such indebtedness. These notes having been reduced and renewed, Price and wife, on January 19, 1894, executed to the defendant two new notes for the old indebtedness in the sum of four thousand four hundred and thirty-four dollars and ten cents, and at the same time gave it one note for two thousand dollars, one note for twelve hundred dollars, and twelve notes for fifty dollars each. They also executed a mortgage on the homestead premises in controversy herein, to secure the payment of these notes and interest. On April 22, 1894, Price and wife gave the defendant bank two renewal notes, each for the sum of four thousand five hundred and forty-eight dollars and sixty-five cents, payable at ninety days with interest. On March 21, 1896, the defendant bank commenced suit on ten different causes of action against Price and wife, including all of the indebtedness heretofore mentioned, and on May 21, 1897, recovered a personal judgment against Price and wife for the sum of sixteen thousand seven hundred and twenty-nine dollars and nine cents, and a decree foreclosing the mortgage on the homestead. Afterward the homestead was sold under such decree and purchased by the defendant bank, and it obtained a sheriff's deed therefor. On March 21, 1896, the same day that the prior action was commenced, the defendant bank began another action against Price and wife on two causes of action, the first being one of the notes executed on April 22, 1894, and alleged as its first cause of action in the prior suit, and the other cause of action being the other note executed on that date, and alleged as its second cause of action in the first suit. In this action judgment was asked for the whole sum of the two notes with interest, and a foreclosure of the deed executed by Price and wife to D. Auld in trust as security for such indebtedness. On May 21, 1897, the defendant bank, after it had obtained judgment in the first action, recovered judgment as prayed for in the second action in the sum of eleven thousand six hundred and seventy-four dollars and eighty-six cents, and a decree foreclosing the trust deed given to D. Auld. This land was afterward sold under such decree, the proceeds thereof to be applied in satisfaction of such judgment. This action was brought to set aside the sheriff's deed to the homestead. The defendant bank recovered judgment, and plaintiffs prosecuted a writ of error.



Waggener, Horton & Orr, for the plaintiffs in error.

C. D. Walker and J. L. Berry, for the defendant in error.

**738** GREENE, J. The important question in this case is: Did the judgment recovered in the former action become merged in the subsequent judgment, and thus extinguished? The defendant in error, in its first action, included all causes of action which it held against Price and wife, and when judgment was rendered in that action all such causes became merged in that **739** judgment. In the forceful language quoted by Freeman in his work on Judgments, section 115, they became "drowned in the judgment." Black, in his work on Judgments, section 674, says: "The cause of action is merged in the judgment and can never again become the basis of any claim against the defendant in the judgment. The original claim has, by being sued upon and merged in the judgment, lost its vitality and expended its force and effect. . . . So where judgment is recovered on a note, it is merged and extinguished, and a second judgment cannot be had thereon between the same parties."

When the defendant in error recovered its first judgment against Price and wife, the several causes of action sued on became merged in that judgment for sixteen thousand seven hundred and twenty-eight dollars and nine cents. This judgment then might have been made a cause of action, but as such it is inseparable and indivisible. The subsequent judgment obtained by the defendant in error must be held to have been on this greater cause of action, and not on a separate part of it. If one has a single cause of action and elects to split it and recover on a part, this is a bar to a recovery on the remainder. In other words, the law declares that whatever of that cause of action is not sued on is merged in the judgment and thus extinguished. To hold otherwise would be to permit a creditor not only to embarrass his debtor but also to bankrupt him in interminable litigation, costs, and record liens on his property. The law will not tolerate this. It was held in *Bolen Coal Co. v. Whittaker Brick Co.*, 52 Kan. 747, 749, 35 Pac. 810: "It is the policy of the law to avoid a multiplicity of actions, and a party is not permitted to split a cause of action into two or more parts and maintain separate actions for each of the separate parts. A recovery **740** of one part of an action so split up will constitute a complete bar to a recovery upon any remaining portion thereof." The same principle was again adhered to in *Thistler v. Miller*, 53 Kan. 520, 42 Am. St. Rep. 302, 36 Pac. 1060.

In *Bateman v. Grand Rapids etc. R. R. Co.*, 96 Mich. 441, 56 N. W. 28, Blaisdell executed to plaintiff a chattel mortgage on certain household goods, securing the payment of eighty-four dollars according to the conditions of a certain promissory note of even date and collateral thereto. On February 28, 1889, plaintiff replevied the mortgaged chattels in the circuit court. In April, 1889, pending the replevin suit, plaintiff recovered judgment on the note before a justice of the peace. The replevin suit was afterward prosecuted to judgment, and the court found that there was nothing due on the debt secured by the mortgage in excess of the amount tendered at the commencement of the suit. Afterward plaintiff took out a writ of garnishment against the defendant in the proceeding before the justice of the peace. The defendant answered, pleading the finding and judgment in the replevin proceeding. The court held that this was a bar to the plaintiff's action; that the judgment in the replevin suit, having become final, was binding and conclusive as to the subject matter on all persons and on all courts.

In the syllabus in *Gould v. Hayden*, 63 Ind. 443, the court said: "Where a judgment is thus recovered upon a judgment, the latter is merged in the former, and all of its liens or priorities released." In the opinion, on page 448, the court used this language: "Was the judgment first rendered in the court of common pleas of Union county, in this state, in favor of said Louis Stix & Co., and against said Louisa J. Johnson, <sup>741</sup> so merged and absorbed in the judgment afterward rendered thereon in the court of common pleas of Warren county, in the state of Ohio, as to destroy the lien, vitality and other qualities of the first-named judgment? It seems very clear to us that this question must be answered in the affirmative. A judgment is a 'debt of record'; and, whether foreign or domestic, an action may be maintained thereon for the recovery of such debt, even where it might appear that the judgment plaintiff could enforce the collection of his judgment by an execution issued out of the court in which it was rendered. . . . If the precedent judgment is merged, as we think it must be, in the succeeding judgment, then it follows of necessity, as it seems to us, that the former judgment is completely extinguished. It has ceased to exist for any purpose; it cannot be used again as the foundation for another action, and all its qualities and incidents are lost and swallowed up in the judgment obtained thereon."

Under the laws of Mississippi, the sheriff or other officer is required, upon the levy of an execution upon personal property, to take a bond, if tendered with sufficient security, from the debtor, payable to the creditors, reciting the service of such execution, and the amount due thereon, in a penalty of double the amount of such execution, with condition to have the property levied on forthcoming at the day of sale; and, in case the property is not forthcoming, said sheriff or other officer shall return the bond so forfeited, with the execution, to the court from which the latter issued, on the return day thereof. The law provides that every bond so forfeited shall have the force and effect of a judgment, and that execution shall issue against all the obligors thereon, etc. Under this law it was held, in *Brown v. Clark*, 4 How. 13: "The original judgment is <sup>742</sup> merged and satisfied by the new and more comprehensive statutory judgment upon the bond."

It was held in *Purdy v. Doyle*, 1 Paige, 558, that "where a creditor has obtained a lien upon real estate by a judgment at law, if he subsequently brings an action of debt on his judgment, and recovers a new judgment, he will lose his first lien."

It is claimed by counsel for defendant in error that the judgment debtors in this case were amply protected. We find nothing in either judgment that protects them. In the first action the defendant in error recovered a judgment for sixteen thousand seven hundred and twenty-eight dollars and nine cents and costs. This was the total amount of the Prices' indebtedness. In the second action it recovered another judgment in the sum of eleven thousand six hundred and forty-seven dollars and eighty-four cents, and costs. Both of these judgments were liens, so far as the record is concerned, on the property of the defendants, and were subject to enforcement. To say that the judgment debtor could have gone into court and pleaded the satisfaction of one as the satisfaction of both is not a protection.

It is contended by counsel for defendant in error that the extinguishment of the judgment by merger would not extinguish the mortgage lien. The mortgage lien was security for the judgment, and when the judgment becomes extinguished or satisfied the security is released; it has nothing upon which to rest. In Kansas a mortgage passes no title; it is but incident to the debt, and cannot continue where there is no debt.

It is also contended by counsel that a merger can only apply where the party has had a full and complete opportunity to re-



cover its whole judgment. In the action brought by the defendant below, it not only had an opportunity to recover its full demand, but it prosecuted that opportunity to final judgment, and after judgment it then waived its right and brought a <sup>743</sup> subsequent action on a portion only of its debt. In its original action it might have brought in all parties necessary to a foreclosure of its mortgage on the homestead, as well as a foreclosure on its deed upon the other real estate; it had the opportunity.

While the several causes included in the first action became merged in the judgment therein rendered, and thereby extinguished, the debt still existed in that judgment, and the second judgment, being for the debt included in the first judgment, is a total extinguishment of that judgment. The judgment itself having been thus extinguished, there was nothing to support the order of sale, and the sale conveyed no title.

It is therefore ordered that the judgment of the court below be reversed, and the cause remanded with instructions to enter judgment for plaintiffs in accordance with this opinion.

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**A Judgment Merges the Cause of Action:** *Tourville v. Wabash R. R. Co.*, 148 Mo. 614, 71 Am. St. Rep. 650, 50 S. W. 300. Compare *Lambert v. Nicklass*, 45 W. Va. 527, 72 Am. St. Rep. 828, 21 S. E. 851. A recovery of part of a demand merges the whole, and bars any further recovery thereof: *Bendernagle v. Cocks*, 19 Wend. 207, 32 Am. Dec. 448; *Oliver v. Holt*, 11 Ala. 574, 46 Am. Dec. 228. A judgment is extinguished when, being used as a cause of action, it grows into another judgment: 1 Freeman on Judgments, sec. 216.

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## FELIX v. BOARD OF COUNTY COMMISSIONERS.

[62 Kan. 832, 62 Pac. 667.]

**CONSTITUTIONAL LAW—CURING UNCONSTITUTIONAL LAWS.**—If public officers, acting under a statute afterward declared unconstitutional, offer bounties for animal scalps and issue county warrants in payment therefor, a subsequent statute legalizing such warrants and declaring them to be county charges and payable out of general county funds, is void as being an encroachment of legislative upon judicial power.

A board of county commissioners, acting under a statute afterward declared unconstitutional by the supreme court of the state, offered bounties for certain animal scalps, and issued a large number of county warrants in payment therefor. While such warrants were outstanding and unpaid the legislature of the state passed the following statute:

"An act legalizing the action of the board of county commissioners of Wallace county in issuing certificates and county warrants for scalps of gophers, rabbits, wolves, and coyotes, directing warrants to be issued to the holders and owners of said certificates, declaring the same to be county charges, and directing and authorizing the warrants already issued and to be issued on such outstanding certificates shall be payable out of the general fund of the county, and repealing all laws and parts of laws, so far as the same may be inconsistent with or repugnant to the provisions of this act.

"Be it enacted by the legislature of the state of Kansas:

"Section 1. Whereas, under the provisions of an act entitled 'An act to protect fruit trees, hedge plants, and fences,' the board of county commissioners of Wallace county offered a bounty for gopher scalps, and in pursuance of said action of said board a number of gophers were killed and certificates given by the county clerk pursuant to said act, and upon some of which certificates and warrants have been passing from hand to hand; and whereas, under the provisions of an act entitled 'An act authorizing a bounty upon wolf, coyote, wild-cat, fox and rabbit scalps, and to repeal chapter 73 of the Laws of 1885, and all other laws in conflict herewith,' the board of county commissioners of Wallace county offered a bounty for the scalps of animals enumerated in said act, and in pursuance of said action a number of said animals were killed and county warrants issued for, and which warrants have been passing from hand to hand."

The statute concluded as set out in the opinion which follows. This statute is chapter 358 of the Laws of Kansas of 1895. This action was brought to recover on warrants for scalps held by the plaintiff. The trial court denied him judgment and he appeals by writ of error.

Bond & Osborn, Benson & Smart, and Garver & Larimer, for the plaintiff in error.

B. G. Hurlburt, county attorney, A. L. Williams, N. H. Loomis, and R. W. Blair, for the defendants in error.

<sup>835</sup> SMITH, J. Does chapter 358 of the Laws of 1895, set out in the statement, have the curative effect of validating the unwarranted acts of the board of county <sup>836</sup> commissioners of Wallace county in issuing warrants in evidence of public in-

debtedness for bounties offered for gopher scalps, make them valid obligations, and fix the amount of the same as a charge upon the county? This is the question now before us.

When the county commissioners made the order offering a bounty on gopher scalps they based their authority so to do on an unconstitutional law. An act of the legislature wholly void can confer no right, power, or authority: Cooley's Constitutional Limitations, 222. Whatever labor was done or services performed for the county in the matter of killing gophers, pursuant to the reward offered, which was authorized in the body of said law, could not be recovered for upon the ground that the county received a benefit for which it justly ought to pay, for the reason that there was a total lack of capacity in the board of commissioners to incur an obligation of the kind mentioned: *Hovey v. Commissioners of Wyandotte Co.*, 56 Kan. 577, 44 Pac. 17. The plaintiff in error, as a holder of the warrants in suit, cannot recover thereon unless the curative law of 1895 supplies, by its retroactive operation, that power which the commissioners lacked in the first instance, and unless the provisions of the healing act cover matters within the range of legislative prerogative.

Retrospective legislation has been held to be valid to the extent of imposing a legal liability upon the people owning property in a portion of a township or other subdivision of the territory of the state, where no such liability existed before, in cases where a pre-existing moral obligation rested upon them to discharge such liability: *Craft v. Lofinck*, 34 Kan. 365, 8 Pac. 399. It is unnecessary, however, to discuss the question of moral obligation in this case, <sup>837</sup> for, if such obligation in fact existed between the county and the holders of these warrants, it would in no manner affect our opinion regarding the invalidity of the act in question. It concludes: "It is hereby declared the duty of said board to issue county warrants for the amount of such certificates now issued and outstanding, and all said warrants so issued and herein authorized to be issued be and the same are hereby legalized, and hereby made county charges, and shall be and are made payable out of the general fund of the county."

It will be noticed that the legalizing force of this law is applied to the warrants already issued and those to be issued after its passage. The assumed authority of the commissioners in making the written obligations is not validated, but the warrants themselves are made binding county charges, payable out



of the general fund. The vitalizing power of the act operates on the warrants only. The effect which necessarily follows from this legislative decree is to convert *prima facie* evidence of debt into incontestable obligations upon the maker, from the payment of which there can be no escape. It is, in short, a judgment rendered by legislative act against the county, and its collection provided for by fixing the amount thereof as a county charge. A charge is defined as an "obligation directly bearing upon the individual thing or person to be affected, and binding him or it to the discharge of the duty or satisfaction of the claim imposed": *Bouvier's Law Dictionary*.

No matter what may have been the defect or failure in the consideration of these warrants, or the extent of the imposition or fraud which might have been practiced in obtaining them, all inquiry into that subject by the courts has been predetermined by this curative <sup>838</sup> act, and the arbitrary will of the legislature interposed, by which defenses are cut off and a liability declared, without trial by the usual methods or proceedings had by resorting to due process of the law.

Let us assume that at the time the act of 1895 went into effect this plaintiff had brought an action to recover from the county the amount of the warrants he then owned, and that the defendant had answered, attacking the consideration of the written instruments sued on. Must the court in which the action was pending, upon reading this law, in obedience solely to a legislative command, summarily enter judgment against the county, without hearing or trial? Such determination would be abhorrent to all sense of justice, and destructive of the vested right which every person has, when sued, to defend against the enforcement of an unjust claim. The legislature cannot be allowed to thrust its arbitrary declarations into such adversary proceedings and decide which party should prevail. It is without power to substitute its judgment in a disputed matter for that of a court engaged in the work of administering justice by orderly methods, after discovering the truth by hearing evidence on both sides admitted according to legal rules. It is not, however, the interference with pending litigation that constitutes the sole evil of such legislation, but it is the divesting of legal defenses upon which a party has a right to rely as security against a successful attack in court by the assertion thereof of an unjust demand against him. The merits of an existing defense which may be pleaded in resistance against an asserted lia-

bility can be affected only by judicial, and not by legislative, action.

Counsel for plaintiff in error have cited cases which instance the almost plenary power that has been exercised <sup>839</sup> by the legislature, with the approval of this court, in the regulation and control of counties. Among them is *State v. Commissioners of Shawnee Co.*, 28 Kan. 431, 434, from which the following language in the opinion is quoted: "In short, as a general proposition, all the powers and duties of a county are subject to legislative control; and, provided the purpose be a public one and a special benefit to the county, it may direct the appropriation of the county funds therefor in such manner and to such amount as it shall deem best."

Under the rule thus stated, the legislature is powerless to charge upon a county the payment of a demand based upon services which have not been performed, for material which has never been delivered, or for money borrowed when no loan has been made. And county warrants issued in such cases cannot be validated by legislative act, for no special benefit has accrued to the county or public purpose been subserved.

There is no provision in the act under consideration which implies that the county commissioners are left any discretion. It is made their duty to issue warrants on all certificates outstanding without inquiry into their validity as public obligations, and at the same time the law declares them to be a charge upon the county, and payable out of the general fund. Ordinarily, the fact that warrants or certificates have been issued by the board does not prevent the county from contesting a suit brought to recover the amount thereof for want of consideration: *Commissioners of Leavenworth v. Keller*, 6 Kan. 510.

We will not extend this opinion by quoting from decisions upholding the position we have taken concerning the force and effect of such laws, but cite the following as cases in point upon the question: *Denny v. Mattoon*, 2 Allen, 361, 79 Am. Dec. 784; *Commissioners of Shawnee County v. Carter*, 2 Kan. 115; *Forster v. Forster*, 129 Mass. 559; *Richards v. Rote*, 68 Pa. St. 248; *Columbia etc. Ry. Co. v. Board of Commissioners of Grant Co.*, 65 Ind. 427; *Lane v. Dorman*, 3 Scam. 238, 36 Am. Dec. 543; *Davis v. Minor*, 1 How. (Miss.) 183, 28 Am. Dec. 325; *Milan County v. Bateman*, 54 Tex. 153; *Allison v. Louisville etc. Ry. Co.*, 9 Bush, 247; *Lindsay v. United States Sav. etc. Assn.*, 120 Ala. 156, 24 South. 171; *In re Handley's Estate*, 15 Utah, 212, 62 Am. St. Rep. 926, 49 Pac. 829; *Resier v. William*

Tell Saving Fund Assn., 39 Pa. St. 137; *Wellington v. Wellington Township*, 46 Kan. 213, 26 Pac. 415.

In a chapter devoted to a discussion of powers exercised by the legislative department, Judge Cooley, in his work on Constitutional Limitations, after commenting on legislation of this kind at page 125, concludes: "In these cases there are necessarily adverse parties; the questions that would arise are essentially judicial, and over them the courts possess jurisdiction at the common law; and it is presumable that legislative acts of this character must have been adopted carelessly, and without a due consideration of the proper boundaries which mark the separation of legislative from judicial duties. As well might the legislature proceed to declare that one man is indebted to another in a sum specified, and establish by enactment a conclusive demand against him."

The judgment of the court below will be affirmed.

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**Legislatures Cannot by Curative Acts impose new duties or obligations:** *Nottage v. Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883. Nor can it do by such acts what it could not have previously authorized: See the monographic note to *People v. Seymour*, 76 Am. Dec. 528, on curative statutes. A curative act is a retrospective law acting on past cases and existing rights, and its effect is to validate irregularities in legal proceedings or to give effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements: *Meigs v. Roberts*, 162 N. Y. 371, 76 Am. St. Rep. 322, 56 N. E. 838.



**CASES**  
**IN THE**  
**COURT OF APPEALS**  
**OF**  
**KENTUCKY.**

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**ROSE v. ROSE.**

[104 Ky. 48, 46 S. W. 524.]

**CONSTITUTIONAL LAW—ACT DEPRIVING HUSBAND OF RIGHT IN WIFE'S LAND.**—A statute giving to a husband a right to the use of his wife's land, with power to rent it for not more than three years at a time and to receive the rent, and which was in force at the time of the marriage and the acquisition of the property, vests in him a statutory right, of which the legislature has no power to divest him by a subsequent married woman's act.

Wilbur F. Browder, for the appellant.

James H. Bowden, for the appellee.

**49 PAYNTER, J.** It appears from the petition, to which the court sustained a demurrer, that the appellant is the wife of appellee, J. A. Rose; that they were married in the year 1890; that a separation has taken place, which is permanent; that they will never live together as husband and wife. It also appears from the petition that after the marriage took place, and before the passage of the act of 1894 (Ky. Stats., secs. 2127, 2128), defining the rights of married women, the appellant, by gift, acquired title to a tract of land containing three hundred and eight acres, and by purchase another tract of one hundred and twenty acres. It is alleged that the husband is in possession of the land, and refuses to surrender it to the appellant. She therefore prays that the possession of it be adjudged to her. The question involved is whether, under the act referred to, the rights of the husband—as they existed at the time of its passage—to the use of the land have been destroyed; that is to say,

did the legislature intend to deprive husbands of their interests in the lands of their wives, or, if it so intended, did it have the power to do so?

At common law the husband became the owner of the personal property of the wife. He likewise became seised of an estate for their joint lives of her freehold lands and chattels real. He could sell the personal property thus acquired, and vest the vendee with a title thereto. He could sell the interest which he acquired in the real estate, and vest the purchaser with the title to the interest which became vested in him by operation of law: 2 Dembitz on Land Titles, 788; 2 Kent's Commentaries, 130; 2 Blackstone's Commentaries, 126. <sup>50</sup> The court held in *McClain v. Gregg*, 2 A. K. Marsh. 454, that marriage gives the husband an estate in the lands of his wife, which he could sell, and that his vendee could maintain ejectment. That opinion was before an act of the legislature reducing the interest of the husband in the wife's land. A divorce restores to the wife the exclusive right to her land: *Hays v. Sanderson*, 7 Bush, 489. As civilization advanced, and as the men who made the laws began to recognize that a wife should not be compelled to surrender practically all of her estate to the husband, but should be given a reasonable protection in the enjoyment of her property, the legislature of Kentucky passed an act which supplanted the common law with reference to the rights of a husband in his wife's real estate. It is section 1, article 2, chapter 52, page 720, of the General Statutes, and reads as follows: "Marriage shall give to the husband, during the life of the wife, no estate or interest in her real estate, including chattels real, owned at the time or acquired by her after marriage, except the use thereof, with power to rent the real estate for not more than three years at a time, and receive the rent. If, however, the wife die during the term for which her land is rented, the rent shall go to the husband, if alive, subject to her debts, contracted as stated in the next section. But, if during such term the husband die, the rent accruing thereafter shall go to the wife or her representatives, subject to her debts as aforesaid." This section was in force at the time the parties to this action were married, and at the time the wife acquired the land. It gives the husband the use of the wife's land, with power to rent it for not more than three years at a time, and receive the rent. It does not allow this rent to be subjected to the payment of his debts, because the legislature thought it wise to place it in the power of the <sup>51</sup> husband to appropriate the rents for the benefit of his

wife and children, if he chose to do so. In obedience to the requirements of the statute, this court has repeatedly held that the rents of the wife's land could not be subjected to the payment of the husband's debts. If the husband cultivates the land himself, then the products of the land have been adjudged to belong to him. The court in *Moreland v. Myall*, 14 Bush, 474, held that corn standing on the wife's land (her general estate) is subject to levy and sale under execution against the husband. While the rent of the wife's land is not liable for the husband's debts, yet, as between the husband and wife, the rent belongs to him: *Barnes v. Burbridge*, 7 Ky. Law Rep. 445. While, under the act in force when the parties married and when the land was acquired, the husband's interest in the wife's land was not so great as at common law, still it is a vested right; and the legislature could not deprive him of the use of his wife's land, and the right to rent it for three years at a time. The act of 1894 declares that marriage shall give to the husband no interest in the wife's property, and that she shall hold it and own it for her separate and exclusive use, free from the debts and control of her husband. The act is not retrospective in its operation. It cannot take from a husband the rights which existed under the law in force at the time of its passage. It is said by Mr. Cooley, in his work on Constitutional Limitations, fifth edition, page 442: "At the common law the husband, immediately on the marriage, succeeded to certain rights in the real and personal estate which the wife then possessed. These rights became vested rights at once, and any subsequent alteration in the law could not take them away." It is held in *Junction R. R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618, that a husband's <sup>52</sup> estate in the wife's land is not impaired by a statute declaring it separate property. Under the law of New York, a husband had a certain interest in his wife's property. Subsequently the legislature passed an act which, in effect, declared that such property should no longer belong to the husband, but should become the property of the wife, as though she were a single female. The court held that the husband's rights could not be impaired by the act of the legislature: *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160. It was held in *Rose v. Sanderson*, 38 Ill. 247, that a legislative enactment cannot take from the husband a vested life estate in the wife's land, and give it to her. Bishop on the Law of Married Women, volume 2, section 40, after stating what are the rights of the husband at common law in the wife's real estate, says:



"This is a vested estate in him; and, within the doctrine discussed under our first subtitle, it is not competent for legislation, without his consent, to take it from him and give it back to the wife." The views we have expressed are supported by *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427, 33 N. E. 51; *Clark v. Clark*, 20 Ohio St. 135; *Wyatt v. Smith*, 25 W. Va. 813. Many authorities could be cited in support of these views. A wife who was married before the act of 1894 took effect is entitled to all the rights in property acquired after the act took effect which it purports to give her. Although the marriage took place before the act took effect, the husband has no right to complain that the legislature has given his wife the control of such property as she acquired after the act took effect. The act did not impair any vested right of the husband in property so acquired. His right was expectant, not vested. Mr. Cooley, in his work on Constitutional Limitations, page 443, in speaking in regard to the husband's expectant interest in the after-acquired <sup>53</sup> property of the wife, said: "It is subject to any changes made in the law before his right becomes vested by the acquisition." In *Allen v. Hanks*, 136 U. S. 300, 10 Sup. Ct. Rep. 961, it was held competent for a state, in its fundamental law or by statute, to provide that all property thereafter acquired by or coming to a married woman shall constitute her separate estate, not subject to the control or liable for the debts of the husband. Such requirements do not take away or impair any vested rights of the husband. The same doctrine was announced in *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427, 33 N. E. 51. It is hardly necessary to observe that, if Mrs. Rose should be divorced from her husband, she is entitled to be restored to the possession and use of her land; or should she in an appropriate proceeding, show herself entitled to alimony or equitable settlement, the products of her land, or the rents thereof, would be subject to the payment of it in the same manner and to the same extent as they would be if the land belonged to the husband. This is upon the idea that the products of the land, or the rents of it, belong to him.

The only case to which the court's attention has been called which militates against the conclusion we have reached, as to the incompetency of the legislature to take from a husband his vested rights, is the case of *Rugh v. Ottenheimer*, 6 Or. 231, 25 Am. Rep. 513. To sustain its conclusion in that case, the court cited *Maguire v. Maguire*, 7 Dana, 183. A similar question to the one involved in this case was not before the court in the *Ma-*

guire case; neither did the court express an opinion on a question like the one involved in this case. The part of the opinion which the Oregon court relied upon to sustain its conclusion was dictum, and that does not even sustain the conclusion of the court. The court in *Gaines v. Gaines*, 9 B. Mon. 308, 48 Am. Dec. 425, did not adhere <sup>54</sup> to the doctrine which was declared in *Maguire v. Maguire*, 7 Dana, 183, but said: "And, if it were conceded, as intimated in *Maguire v. Maguire*, 7 Dana, 183, that the marriage contract is not, as a contract, wholly removed, like other contracts, from the power of the legislature to dissolve it in any particular case by special act of divorce, and that the dissolution of a marriage, if required by the public good, may be a legislative function, still it cannot be admitted that a power thus deduced, uncertain, upon principle, as to its existence, and still more uncertain as to the grounds of its legitimate exercise, can override the express and highly conservative prohibitions in the constitution, intended for the protection of private rights of property. We are of opinion, therefore, that whatever power, to be exercised in view of the public good, the legislature may have to enact divorces in special cases, as it cannot, even for the public good, change the right of private property from one to another without compensation, much less can it do so by a special act of divorce, sought by one of the parties against the consent of the other, with the purpose or effect of operating upon the rights of property incident to the marriage relation, as created and sustained by the general laws applicable to that relation." The act of the legislature in question does not attempt to dissolve the marriage contract, nor does it give any additional grounds upon which a court might do it. So the dictum in the *Maguire* case, to wit, "and therefore marriage, being much more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts," could be regarded as a correct statement of constitutional law, and still would have no application to the question at bar.

<sup>55</sup> We have not felt it necessary to discuss marriage as a social relation, nor the necessity of the regulation and control of it by the sovereign power of the state. Neither have we felt it necessary to discuss the question as to the power of the legislature to prescribe the causes for which the marriage contract or relation may be dissolved. Neither would it be profitable to determine the question whether marriage is a contract *sui generis*, or one *publici juris*, or both. The marriage rela-

tion was assumed by the parties, it still exists, and no effort is made to have the court dissolve it. The questions we have been called upon to determine were: 1. What rights did the marriage give the husband in the wife's property? 2. Can the rights thus acquired be taken from the husband by the legislature and given to the wife? Our conclusions are supported by the common law, by the consensus of judicial opinion, and by the ablest writers on constitutional law. We have thought it neither wise nor judicial to disregard the rules of law, which are the crystallization of judicial opinion. Neither do we think, because lawmakers may have been slow in giving to wives freedom in the control of their property, that we should give our sanction to a law which, if upheld, will take the property of the husband and give it to the wife. If change and transition are to take place in the domestic relationship, although right and for the public good, still it should not be done at the sacrifice of vested rights.

Judgment affirmed.

THREE OF THE JUDGES DISSENTED. Judge Du Relle was one of them. He said that it was essential to an understanding of the reasons of the dissent that the views of the minority upon the institution of marriage, and the peculiar limitations which have been placed by the courts upon the scope and effect of the so-called marriage contract, should be stated. He made many extracts from a number of sources, and took the ground that the marriage status, or relation existing between husband and wife, is, with all its attending rights, subject to the sovereign power of the state; that the relation may be entirely abrogated, and every resultant right destroyed, together with the relation from which it sprung, and that the marriage relation and its attendant rights are not included in the provisions of the state or federal constitution as to laws impairing the obligation of contracts. "The vinculum of the marriage may be broken," he said, "either by direct statutory action, or under statutory authority given to the courts; and this may be done for causes antecedent to the statute: *Carson v. Carson*, 40 Miss. 349; *Berthelemy v. Johnson*, 3 B. Mon. 90, 38 Am. Dec. 179; *West v. West*, 2 Mass. 223; *Bigelow v. Bigelow*, 108 Mass. 38. If the foundation of the rights may be taken away, with the result of the absolute destruction of such rights in all property which has not been lawfully consumed or disposed of during the existence of the marriage, why cannot the rights themselves be altered, or modified, or taken away without the dissolution of the marriage itself? What peculiar sanctity attaches to a marital right which does not belong to the institution of marriage? Does not the greater power include the less? Is not the whole greater than any of its parts?"



The learned judge admitted the existence of cases either stating or implying a distinction between the marriage status and the rights of property which accrue under it; and recognized the fact that a distinction is also drawn in the cases between the various kinds of marital rights, by dividing them into vested and nonvested rights. "The preponderance of the decisions," he said, "is to the effect that both curtesy and dower are not vested rights, though it is difficult to see upon what reason the distinction is founded"; and, after some discussion of the question of vested rights, he stated his position as follows: "It is not claimed that any part of the wife's property which had been lawfully consumed or lawfully disposed of during the continuance of the marriage relation, or before any statutory interference with the husband's rights, would be affected by a statute like the one under consideration; but it is insisted that, as between the husband and wife, all the rights growing out of the marital status are subject to the sovereign will": Citing and commenting upon *Rugh v. Ottenheimer*, 6 Or. 231, 25 Am. Rep. 513.

"It is conceded," he said, "that, if we are to be guided by the mere number of cases which have been decided upon this question, the husband's contention must prevail. But if we are to reach our conclusion by reasoning from the nature of the marriage relation, and the principles which underlie it, it must be decided in favor of the wife." He deemed it unprofitable to discuss the wisdom of the act of March 15, 1894 (Ky. Stats., sec. 2127), because it had been adopted, and said: "My conclusion is that it was intended to take effect at once, as to all property held by virtue of existing or future marriages, except as to such as had theretofore been lawfully consumed or disposed of, and, further, that it is not in conflict with the constitution, for the reason that all rights obtained by virtue of the status of marriage are taken subject to the sovereign power of the state to alter or modify them. In my opinion, the judgment should be reversed."

JUDGE HAZELRIGG ALSO DISSENTED. He thought that it was "a stretch of legal nomenclature" to call the husband's right to the use of his wife's land, with power to rent the same for not more than three years at a time, as provided by the statute, "an estate or interest in lands at all, and a clear confusion of terms to call such uncertain and contingent interest a vested estate or interest." The husband, he said, cannot sell this use, nor can his creditors subject it to their debts, contracted either before or during his marriage. The argument, he said, of the cases relied on in the majority opinion finds its chief support in the recited fact that the husband's interest in the wife's lands may be sold or otherwise disposed of by him, or by his creditors. The learned judge did not believe that any case could be found "holding such a restricted, shadowy and uncertain use as is given the husband in his wife's lands under the Kentucky statutes in force when the parties to this marriage entered into that relation to be a vested estate or interest in lands." Judge Burnam concurred in this dissent.

# CONSTITUTIONALITY OF STATUTES AFFECTING RIGHTS BASED ON PRE-EXISTING MARRIAGE.\*

- I. Property Rights Arising out of Marital Relations, When Vested.
- II. Husband's Estate in Wife's Real Property.
- III. Husband's Estate in Wife's Personal Property.
- IV. Estates by the Entireties.
- V. Statute Concerning Separate Property.
- VI. Estates by Curtesy.
- VII. Dower Rights.
- VIII. Statutes Impairing the Marital Obligation.
- IX. Statutes Changing Rights by Descent.

**I. Property Rights Arising out of Marital Relations, When Vested.**—Marriage is not simply a contract, and property is not primarily or solely its object. It is but an incident, which may or may not attach. Marriage is a great public institution, and there is, as between husband and wife, no constitutional provision protecting the marriage itself, or the property incident to it, from legislative control, by general law, upon such terms as public policy may dictate: *Noel v. Ewing*, 9 Ind. 37, 50. But this control can be exercised only in conformity with the constitutional rights of the parties. A legislature has constitutional authority to change, modify, or abolish expectant estates of all kinds, because a mere expectation of property in the future is not considered a vested right: *Henson v. Moore*, 104 Ill. 403; *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681; *Holliday v. McMillan*, 79 N. C. 315; but it has no power to divest the vested marital rights of the parties to a marriage, acquired before the passage of the law. A right to property is a vested right: *Henderson etc. R. R. Co. v. Dickerson*, 17 B. Mon. 173, 66 Am. Dec. 148; and vested rights to property arising out of the marital relation cannot be affected by subsequent laws, or a change of law: *Holliday v. McMillan*, 79 N. C. 315, 317; *Taylor v. Sample*, 51 Ind. 423, 425; *Henson v. Moore*, 104 Ill. 403, 409.

As said in *Davis v. O'Ferrall*, 4 G. Greene, 168, "every statute which takes away or impairs a vested right, acquired under previous laws, must be considered retrospective, and opposed to those principles of jurisprudence which have received universal commendation."

Thus, while courts favor dower, this favor should not be carried so far as to do violence to fundamental principles, and to the rights of bona fide purchasers. In other words, it should not be allowed to divest vested rights: *Davis v. O'Ferrall*, 4 G. Greene, 168; *May v.*

## \*REFERENCES TO MONOGRAPHIC NOTES.

Constitutionality of acts validating contracts and deeds of married women: 16 Am. Dec. 518-520.

Legislative divorces, constitutionality of: 48 Am. Dec. 437-439.

Retrospective laws: 10 Am. Dec. 131-140.

Separate property of wife as affected by American Statutes: 76 Am. Dec. 367-401.

Succession to estates of intestates: 12 Am. St. Rep. 81-113.

Tenancy by entireties: 18 Am. Dec. 377-389.

Fletcher, 40 Ind. 575; *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681. For example, where a husband's land is sold under an execution against him, subject to the wife's inchoate dower, and the husband dies after the passage of a statute abolishing her right of inchoate dower, it is clear that the legislature had the power to abolish inchoate dower, but it is just as clear that it had not the power to impair the vested right of the purchaser, and it must be held that the widow has no interest in the land, for it was not competent for the legislature, by a statute of descents, passed after the purchaser took the property subject only to inchoate dower, to change the encumbrance into a fee simple: *Taylor v. Sample*, 51 Ind. 423. A legislature has power to change the law of curtesy, dower, or descent, or to abolish expectant rights under such laws, at any time before they become vested estates by the death of the person from whom they are derived. When any legislative change of law is made before an estate becomes vested, the land or other property of the deceased will pass according to the laws then in force, but no change afterward made in the law can have any bearing on the rights of the parties: *Henson v. Moore*, 104 Ill. 403, 409. An interest in property which can be seized on execution and sold by creditors in payment of their debts, is such a vested interest as the fundamental law will protect from destruction by retroactive legislation. For instance, the estate by the curtesy initiate, as it existed under the common law, and before it was qualified by the modern statutes enlarging the rights of married women, was a vested estate, and could not be destroyed by legislation which took effect after it came into existence: *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681; *National Met. Bank v. Hitz*, 1 Mackay, 111.

A legislature cannot take away or interfere with the pre-existing vested rights of the husband in his wife's land: *Rose v. Sanderson*, 38 Ill. 247; *National Met. Bank v. Hitz*, 1 Mackay, 111. Nor can it deprive a husband of his vested right to dispose of community property by gift. Thus, if community property is acquired under a statute giving the husband the same power over it, other than testamentary, as of his separate estate, the husband is the owner of such property, and the interest of his wife therein is a mere expectancy; and an amendment of such statute providing that he cannot make a gift of such property or convey it without consideration unless his wife in writing consents thereto, cannot be applied to community property acquired prior to its enactment: *Spreckels v. Spreckels*, 116 Cal. 339, 58 Am. St. Rep. 170, 48 Pac. 228. A law not in force until after a gift is complete cannot affect the vested rights of parties under the deed of gift; *Fisher v. Allen*, 2 How. (Miss.) 611, 615; and rights are not destroyed by the repeal of a law under which they were acquired: *Dixon v. Dixon*, 4 La. 188, 23 Am. Dec. 478.

A husband's vested rights in his wife's property, already acquired under the law regulating the marriage contract, cannot be disturbed



by legislation enlarging the separate property rights of married women. Statutes of this character do not divest the husband's vested marital rights: *Hershizer v. Florence*, 39 Ohio St. 516; *Erwin v. Puryear*, 50 Ark. 356, 7 S. W. 449; *Rose v. Sanderson*, 38 Ill. 247; *Beale v. Knowles*, 45 Me. 479; *National Met. Bank v. Hitz*, 1 Mackay, 111. A legislature has power to secure to a deserted wife not merely the rights and privileges of a feme sole trader, but may also confer on her the absolute and unqualified right to dispose of her own property, real and personal, in her own way, unencumbered by her husband's curtesy, and such a statute is constitutional: *Moninger v. Ritner*, 104 Pa. St. 298. A legislature has power, of course, to modify the incidents of the marriage relation in respect to property to be acquired after a change of law respecting it: *Kelly v. McCarthy*, 3 Bradf. 7; and a legislature has constitutional authority to make a married woman's property liable for family expenses, for debtors have no vested right not to pay their debts: *Myers v. Field*, 146 Ill. 50, 34 N. E. 424; but even a constitution cannot divest the vested marital rights of a husband acquired in the lands of his wife before its adoption: *Shryock v. Cannon*, 39 Ark. 434; *Erwin v. Puryear*, 50 Ark. 356, 7 S. W. 449; and this applies to that provision of a constitution which gives the property of a married woman to her as her separate estate: *Shuler v. Bull*, 15 S. C. 421. On the same principle, where a husband's life estate in his wife's land has become vested in the husband, and liable for his debts, long before the adoption of a constitutional provision to protect the property of married women from the debts, liabilities and control of their husbands, his creditors cannot be divested of their vested right by such provision: *Wyatt v. Smith*, 25 W. Va. 813. In the exceptional case of *Rugh v. Ottenheimer*, 6 Or. 231, 25 Am. Rep. 513, it was held that a constitutional provision exempting from the debts or contracts of the husband the property and pecuniary rights of every married woman, at the time of marriage or afterward, acquired by gift, devise, or inheritance, exempted the lands of a woman who was married before the adoption of the state constitution. If a marriage takes place before the adoption of a constitution, and the wife acquires certain personal property thereafter, it may, of course, vest in her, under the provisions of the constitution, as her separate estate, free from her husband's debts, etc.: *Holliday v. McMillan*, 79 N. C. 315. Compare the monographic note to *Goshen v. Stonington*, 10 Am. Dec. 131-140, on retrospective laws, wherein the question of vested rights is discussed.

**II. Husband's Estate in Wife's Real Property.**—At common law, by virtue of the marriage alone, and without the birth of issue, the husband was seised of an estate, during coverture, in the lands held by his wife in fee. He was said to have been seised of the freehold jure uxoris. He took the rents and profits during the joint lives of himself and his wife. This estate was ended by the death of the wife or the death of the husband. It applied to land, in

which the wife was seised of an estate of inheritance either at the time of the marriage, or after the marriage. It was a freehold estate and has sometimes been called a "tenancy by the marital right." It was an estate vested in the husband, liable to be sold on execution against him, and it was not competent for legislation, without his consent, to take it from him and give it back to the wife: *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681, per Magruder, J.; *Wyatt v. Smith*, 25 W. Va. 813. Before the birth of issue, the husband was seised of the freehold not as his own, but as the freehold of his wife. After issue was born, the husband's estate was changed in its character. He then had a freehold in his own right. He then had an independent estate in his wife's land, which he could alien by his separate act, and it was bound by judgments against him for his separate debts: *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681; *Wyatt v. Smith*, 25 W. Va. 813, per Snyder, J.; *Montgomery v. Tate*, 12 Ind. 615.

A husband, by marriage, before the modern statutes enlarging the separate property rights of married women, acquired an immediate and vested interest in his wife's realty for their joint lives: *Van Duzer v. Van Duzer*, 6 Paige, 366, 31 Am. Dec. 257; *Montgomery v. Tate*, 12 Ind. 615; *Wood v. Wood*, 83 N. Y. 575; and so it was if lands were conveyed to her during coverture; *Junction R. R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673. Nor could the legislature take away this vested right. It could not divest the husband's estate in his wife's land by an act passed after the marriage though before the conveyance of the land to her; nor was his estate therein impaired by a statute declaring the wife's land separate property and exempting it from liability for his debts, without more, and the operation of such a statute was not enlarged by construction; *Junction R. R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618. The Illinois married woman's act of 1861 had the effect of abolishing the estate known as the estate during coverture or tenancy by the marital right: *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681; but the husband's freehold *jure uxoris* was not divested by the Ohio married woman's act of 1861: *Hershizer v. Florence*, 39 Ohio St. 516; or by the Indiana statute of 1838: *Montgomery v. Tate*, 12 Ind. 615; or by the Maryland act of 1841: *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708; *Porter v. Bowers*, 55 Md. 213. In Rhode Island, it has been held that the constitutionality of a statute permitting the wife to convey her realty without the joinder of her husband in the deed, cannot be questioned on the ground that it takes away the estate during coverture, where the property involved was acquired after the husband's estate by the marital right was abolished: *Taft v. Cannon* (R. I., March, 1896), 34 Atl. 148.

**III. Husband's Estate in Wife's Personal Property.**—By the common law, marriage operates as an absolute gift to the husband of all the personal chattels of the wife, which were in her posses-

sion at the time. The husband has a vested right to such property, and the legislature cannot take it away from him by subsequent legislation, enlarging the separate property rights of married women: *Buchanan v. Lee*, 69 Ind. 117, 121. But with respect to a wife's choses in action, there is only a qualified gift by the common law to the husband, on condition that he reduce them into possession during the coverture: *Clark v. McCreary*, 12 Smedes & M. 347, 352; and the weight of authority is to the effect that a husband has no vested interest in his wife's choses in action, which he has taken no steps to reduce to his possession; and that his interest therein may, without violating any fundamental principle as to vested rights, be taken away by a statute for the benefit of married women: *Percy v. Cockrill*, 53 Fed. 872; *Mellinger v. Bausman*, 45 Pa. St. 522; *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335; *Clarke v. McCreary*, 12 Smedes & M. 347; *Henry v. Dilley*, 25 N. J. L. 302; although the marriage took place before the passage of the act: *Percy v. Cockrill*, 53 Fed. 872. The Virginia married woman's act of 1877 destroyed the husband's right to reduce his wife's choses in action into his possession, it not being a vested estate: *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335.

Other authorities hold that the husband's right to reduce his wife's chose in action into his possession is a vested right, of which he cannot be deprived by an act passed for the benefit of married women: *Winn v. Riley*, 151 Mo. 61, 74 Am. St. Rep. 517, 52 S. W. 27; *Leete v. State Bank*, 115 Mo. 184, 21 S. W. 788, disapproving *Hart v. Leete*, 104 Mo. 315, 15 S. W. 976; nor by a constitution adopted subsequently to the marriage: *O'Connor v. Harris*, 81 N. C. 279, 284. Thus, it has been held in New York that a husband, by the marriage, acquires a vested right in the choses in action of his wife, and that this right cannot be arrested or divested by legislative enactment after the marriage, even though the husband has taken no steps to reduce them to possession: *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160. In this case, it is held that the right to a legacy cannot be impaired by a law passed after the legacy has vested by the testator's death; and that a statute, such as the New York married woman's act of 1848 abrogating a husband's marital right to choses in action of his wife, cannot affect a husband's right to continue the prosecution of a suit for one, begun before the act. The learned judge, who rendered the opinion, also referred to a distinction which he thought was not always kept in view. "A right," he said, "to reduce a chose in action to possession is one thing, and a right to the property, which is the result of the process by which the chose in action has been reduced to possession, is another and a different thing. But they are both equally vested rights. The one is a vested right to obtain the thing, with the certainty of obtaining it by resorting to the necessary proceedings, unless there be a legal defense, and the other is a vested right to the thing after it has been obtained": *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160. The right to



reduce to possession the distributive share of a wife's inherited estate, where she dies before the passage of an act, vesting all property, inherited by her, as her separate estate, is also said in *Sperry v. Haslam*, 57 Ga. 412, to be a vested right in the husband. If he reduces it to possession, as his own estate, after such enactment, it becomes his property, and is subject to his debts, though it would be otherwise. If he reduces it to his possession, for his wife, as her estate, after such enactment: *Sperry v. Haslam*, 57 Ga. 412. Where personal property has been bequeathed to a wife upon the contingency of her surviving a life tenant, it has been held that her husband's interest is so far vested that the legislature has no power to take it away by a statute passed before the contingency happens, without any compensation or substitute whatever: *Dunn v. Sargent*, 101 Mass. 336.

The common-law right of a husband to his wife's earnings is not divested by the adoption of a constitution, which contains nothing taking away this property from the husband and conferring it upon his wife, and where the statute simply enlarges her powers over her own property, without undertaking to invest her with property previously belonging to her husband: *Bridgers v. Howell*, 27 S. C. 425, 3 S. E. 790.

**IV. Estate by the Entireties.**—A tenancy by the entireties is not abolished by a statute abolishing survivorship among joint tenants: *Bramberry's Appeal*, 156 Pa. St. 628, 36 Am. St. Rep. 64, 27 Atl. 405; *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266; nor by legislation which enables married women to hold property independent of their husbands: *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210; *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266; *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462, 4 N. E. 824; *Bramberry's Appeal*, 156 Pa. St. 628, 36 Am. St. Rep. 64, 27 Atl. 405. A conveyance to husband and wife has the common-law effect, notwithstanding such legislation: *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52, 9 Atl. 695. Under the New York statutes respecting the separate property of married women, by which a husband is deprived of his control over the property of his wife, and of his right to exclude her from its enjoyment, he has no greater interest in, or control over, the property held by him and his wife as tenants by the entireties than she has: *Hiles v. Fisher*, 144 N. Y. 306, 43 Am. St. Rep. 762, 39 N. E. 337. Compare the monographic note to *Den v. Hardenbergh*, 18 Am. Dec. 377-389, on tenancy by entireties.

**V. Statutes Concerning Separate Property.**—In many of the states, the rights of married women as to their separate property, and their power over it, do not depend upon the principles of the common law, or upon the doctrines of courts of equity, but mainly upon the constitution and statutes of the state. In other words, the constitution and the statute now form the main source of their right to, and power of disposition over, such estates: *Maclay v. Love*, 25 Cal. 367, 85 Am. Dec. 133. The Wisconsin statute defining the

rights of married women over their separate estate does not apply to real estate derived from the husband. It applies only to her real estate derived from other sources: *Pike v. Miles*, 23 Wis. 164, 99 Am. Dec. 148. The act of April 17, 1850, defining the rights and duties of husband and wife in California, applies "to property held as separate by women married after the passage of the act," without reference to the time when it was acquired: *Maclay v. Love*, 25 Cal. 367, 85 Am. Dec. 133.

A married woman's act, so far as it divests existing rights of property in married persons, is unconstitutional: *Holmes v. Holmes*, 4 Barb. 295; *White v. White*, 5 Barb. 474; *Burson's Appeal*, 22 Pa. St. 164; *Bachman v. Chrisman*, 23 Pa. St. 162; and see *Quigley v. Graham*, 18 Ohio St. 42. Where a woman has married and acquired rights of property, she is not divested of such rights by the subsequent adoption of a constitution, where no vested rights of other persons have intervened: *Witte v. Clarke*, 17 S. C. 313. After a husband has become vested with a complete legal estate in his wife's lands any state legislation, either by a constitution or statute, which undertakes to withdraw such property from his creditors would be unconstitutional: *Bouknight v. Epting*, 11 S. C. 71, 74; and it seems that a statute for the better securing of the property of married women does not take away the husband's right to administer upon, and to take as his own, the personal property of his deceased wife, where she dies intestate: *Johnson v. Cummins*, 16 N. J. Eq. 97, 84 Am. Dec. 142.

A married woman's statute, so far as it relates to future acquisitions of property, is constitutional: *Blood v. Humphrey*, 17 Barb. 660; but a statute which gives the fruits or the proceeds of the wife's separate property to her husband or his creditors is unconstitutional: *George v. Ransom*, 15 Cal. 322, 76 Am. Dec. 490. The legislature may enact laws for the further assurance of the wife's right in her separate property, by throwing safeguards around the *jus disponendi*, but it cannot so legislate as to impair it in any degree: *Lewis v. Johns*, 24 Cal. 98, 85 Am. Dec. 49.

Under constitutional and statutory provisions authorizing a married woman to hold property and to contract as if unmarried, her engagement as surety is valid and binding, although it does not in terms charge her separate property: *Pelzer v. Campbell*, 15 S. C. 581, 40 Am. Rep. 705. Under the Alabama statute relating to the separate estates of married women, passed before the Civil War, if a life estate in slaves was conveyed to a wife, such interest became her separate estate, and did not pass to her husband by virtue of his vested interest in the remainder. In such a case, there could be no merger of the life estate in the remainder: *Goode v. Longmire*, 35 Ala. 668, 76 Am. Dec. 309. The statute of 32 Henry VIII, chapter 28, giving to a wife and her heirs a right of entry on her own lands upon the death of her husband, is in force in Massachusetts, and she may obtain a writ of entry against her husband's grantee: *Bruce v. Wood*, 1 Met. 542, 35 Am. Dec. 380. Under the married

woman's act of Missouri, passed in 1875, a husband, though married to his wife before the passage of that act, has no vested interest in personal property acquired by her subsequently to that date, and has no power to appropriate it to his own use without her consent in writing: *Winn v. Riley*, 151 Mo. 61, 74 Am. St. Rep. 517, 52 S. W. 27. A legislature has power to provide a special mode of conveying a husband's interest in his wife's land, and to declare such a conveyance invalid unless the wife joins with him therein, as such a statute does not, in any sense, deprive the husband of his estate. The legislature may, at all times, prescribe the mode of conveying property, especially real property, and it is of no importance whether the provision is applied to all estates or only to particular estates: *Peck v. Walton*, 26 Vt. 82, 86. See, *Maclay v. Love*, 25 Cal. 367, 85 Am. Dec. 133. If a marriage takes place before the adoption of a constitution, requiring the assent of the wife to the disposition of a homestead, but property is thereafter acquired as a homestead, the wife must join in the deed: *Castlebury v. Maynard*, 95 N. C. 281. The Massachusetts statute of 1857, confirming titles to real estate, in which the grantor's wife failed to join in releasing the homestead, was, as against the grantor, constitutional: *Johnson v. Fay*, 16 Gray, 144.

A state has power either by a constitution or by a statute to provide that all property thereafter acquired by, or coming to, a married woman, shall be her separate estate, not subject to her husband's control, or liable for his debts: *Allen v. Hanks*, 136 U. S. 309, 310, 10 Sup. Ct. Rep. 961. Compare the monographic note to *Kirkpatrick v. Buford*, 76 Am. Dec. 367-401, discussing the separate property of a wife as affected by American statutes.

**VI. Estates by Curtesy.**—The weight of authority is in favor of the position that the estate of tenancy by the curtesy initiate, as it existed under the common law, and before it was qualified by the modern statutes enlarging the rights of married women, was a vested estate, and could not be destroyed by legislation which took effect after it came into existence, though the legislature had full power to modify or even abolish it before that time: *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681. Under the common law, the husband's estate was initiate on issue had, and consummate on the death of the wife: *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681; but, under the qualifications imposed upon the estate of tenancy by the curtesy by the modern statutes enlarging the rights of married women, the husband's right to the curtesy in the land of his wife is contingent, and does not vest in the husband until the death of the wife. Before the death of the wife, he has no estate by the curtesy, either initiate or consummate; and the legislature may, therefore, change, modify or abolish the estate by the curtesy at any time prior to the wife's death, because, until then, her husband has no vested interest in her estate, and the abrogating statute would affect only inchoate rights: *Jackson v. Jack-*



son, 144 Ill. 274, 36 Am. St. Rep. 427, 33 N. E. 51; *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681; *Henson v. Moore*, 104 Ill. 403; *Brown v. Clark*, 44 Mich. 309, 6 N. W. 679; *Hill v. Chambers*, 30 Mich. 422; *Tong v. Marvin*, 15 Mich. 60; *Hathon v. Lyon*, 2 Mich. 93; *Hershizer v. Florence*, 39 Ohio St. 516; *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200; *Hamilton v. Hirsch*, 2 Wash. Ter. 223, 5 Pac. 518. The husband's interest being contingent until the death of the wife, a law cutting off the estate by the curtesy before that time is valid, and defeats the husband's estate or interest, whatever it may be: *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681. Such legislation is the taking away of an expectancy, and not the destruction of a vested right: *Hamilton v. Hirsch*, 2 Wash. Ter. 223, 5 Pac. 215. A statute purporting to abolish existing tenancies by curtesy and in dower already in enjoyment can only be held to take away inchoate rights, and is, so far as vested rights are concerned, unconstitutional and void: *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200. And the exercise of the legislative power, in creating a statutory estate by the curtesy does not interfere with the wife's absolute control of the property during her lifetime, or with her right to dispose of it. It only subjects it after her death to the interest of the surviving husband as a limitation upon the inheritance, and does not interfere with any constitutional right of the wife: *Brown v. Clark*, 44 Mich. 309, 6 N. W. 679. If, by the statute in force when land is acquired by a married woman, she is declared to remain during coverture the sole owner thereof as her separate estate to be held, possessed, and enjoyed by her the same as though she were unmarried, the legislature may, as to such lands, abolish the estate by the curtesy at any time prior to her death, because until then her husband has no vested interest therein: *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427, 33 N. E. 51. But when a husband becomes entitled, under a statute, and upon the birth of issue, to a vested estate in his wife's realty, as tenant by the curtesy initiate, he cannot be divested of this right by the subsequent passage of a married woman's act: *Mitchell v. Violette*, 104 Ky. 77, 47 S. W. 195.

Curtesy initiate, as it existed at common law, has been abolished in Ohio: *Hershizer v. Florence*, 39 Ohio St. 516; but see *Denny v. McCabe*, 35 Ohio St. 576; in North Carolina: *Walker v. Long*, 109 N. C. 510, 14 S. E. 299; in Washington Territory: *Hamilton v. Hirsch*, 2 Wash. Ter. 23, 5 Pac. 215; and destroyed in Virginia: *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335; though it seems that if the wife dies without having alienated the lands the husband's curtesy attaches: *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740. The statutes of Michigan have also entirely abrogated the existence of prospective tenancy by the curtesy: *Hill v. Chambers*, 30 Mich. 422; *Tong v. Marvin*, 15 Mich. 60; *Hathon v. Lyon*, 2 Mich. 93.

But an estate by the curtesy has not been abolished by acts for the benefit of married women in Arkansas: *Hampton v. Cook*, 64 Ark. 353, 62 Am. St. Rep. 194, 42 S. W. 525; *Neelly v. Lancaster*, 47 Ark. 175, 58 Am. Rep. 752, 1 S. W. 66; in the District of Colum-

bia: *Smith v. Smith*, 21 D. C. 289; *Uhler v. Adams*, 1 App. Cas., D. C., 392; in Kentucky: *Mitchell v. Violet*, 104 Ky. 77, 47 S. W. 195; in Maryland: *Porter v. Bowers*, 55 Md. 213; *Hoffman v. Rice*, 38 Md. 285; *Logan v. McGill*, 8 Md. 461; *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708; *Cushing v. Blake*, 30 N. J. Eq. 697; in Pennsylvania: *Commissioners v. Directors*, 169 Pa. St. 116, 32 Atl. 541; or in West Virginia: *Wyatt v. Smith*, 25 W. Va. 813. Statutes giving to married women the exclusive ownership and control of their real estate, and providing that it shall not be liable for the debts of their husbands or subject to the latter's disposal, do not abolish the right of tenancy by the curtesy: *Neelly v. Lancaster*, 47 Ark. 175, 58 Am. Rep. 752, 1 S. W. 66; *Johnson v. Cummins*, 16 N. J. Eq. 97, 84 Am. Dec. 142; *Alderson v. Alderson*, 46 W. Va. 242, 33 S. E. 228. A husband will not be excluded from rights in the property of the wife springing from the marital relation, except by words that leave no doubt of the intention to do so. The married woman's act of New Jersey most effectually makes the estate of the wife her separate, yet it has not abolished the husband's curtesy after her death: *Cushing v. Blake*, 30 N. J. Eq. 689, 697. It is held, however, that a statute which enacts that a married woman's property shall not be liable for her husband's debts, exempts his estate by the curtesy in her real estate from being taken for his debts contracted after the act was passed: *Hitz v. National Met. Bank*, 111 U. S. 722, 4 Sup. Ct. Rep. 613. Until the Missouri act of 1889, a married woman in that state took an estate in lands subject to her husband's right of curtesy; and it has been held that such estate could not be divested by that statute, for such a construction would give it a retrospective operation, repugnant to the constitution: *Clay v. Mayr*, 144 Mo. 376, 46 S. W. 157. The Illinois married woman's act of 1861 did not entirely destroy the estate of tenancy by the curtesy initiate, but it materially modified that estate: *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681; *Noble v. McFarland*, 51 Ill. 226; *Freeman v. Hartman*, 45 Ill. 57, 92 Am. Dec. 193; and such estate was not abolished in Mississippi until the adoption of the code of 1880, although it had been converted, by previous legislation, from a vested into a contingent estate: *Hill v. Nash*, 73 Miss. 849, 19 South. 707. Concerning changes made in the law of curtesy by statutes, see the monographic note to *In re Ingram*, 12 Am. St. Rep. 85, discussing succession to estates of intestates.

**VII. Dower Rights.**—The dower right of a wife, during the life of her husband, is not a vested estate, but a mere expectancy or possibility, and the law-making power may deal with it as may be deemed proper. It is not a natural right, but one wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away, at any time before the husband's death. In other words, dower, before the husband's death, is inchoate, and does not become property until that time. It is therefore subject to legislative control, and may, during its

inchoate stage, be enlarged, diminished, altered, or abolished: *Randall v. Kreiger*, 23 Wall. 137, 148; *Virgin v. Virgin*, 189 Ill. 144, 59 N. E. 586; *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681; *Henson v. Moore*, 104 Ill. 403; *Noel v. Ewing*, 9 Ind. 37; *Frantz v. Harrow*, 13 Ind. 507; *May v. Fletcher*, 40 Ind. 575; *McCraney v. McCraney*, 5 Iowa, 232, 68 Am. Dec. 702; *Lucas v. Sawyer*, 17 Iowa, 517; *Chapman v. Chapman*, 48 Kan. 636, 29 Pac. 1071; *Hatch v. Small*, 61 Kan. 242, 59 Pac. 262; *Barbour v. Barbour*, 46 Me. 9; *Pratt v. Tefft*, 14 Mich. 191; *Morrison v. Rice*, 35 Minn. 436, 29 N. W. 168; *Magee v. Young*, 40 Miss. 164, 90 Am. Dec. 322; *Moore v. Mayor*, 8 N. Y. 110, 59 Am. Dec. 473; *Sutton v. Askew*, 66 N. C. 172, 8 Am. Rep. 500; *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355; *Melizet's Appeal*, 17 Pa. St. 449, 55 Am. Dec. 573; *Hamilton v. Hirsch*, 2 Wash. Ter. 223, 5 Pac. 215; *Thornburg v. Thornburg*, 18 W. Va. 522; *Bennett v. Harms*, 51 Wis. 251, 8 N. W. 222; *Richards v. Bellingham Bay Land Co.*, 54 Fed. 209. Contra, that the legislature has no power to divest inchoate dower, see *Williams v. Courtney*, 77 Mo. 587; and that the Missouri statute of 1878 did not do so, see *Bartlett v. Ball*, 142 Mo. 28, 43 S. W. 783. In Utah, dower was abolished in 1872, but was re-established in 1887: *Norton v. Tufts*, 19 Utah, 471, 57 Pac. 409. The same rule above announced as to a wife's dower in her husband's land applies to the husband's dower in his wife's land: *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681.

Vested rights are not impaired by a change in the law of dower during the lifetime of the husband, nor by a change in the husband's rights to such choses in action as have not been reduced to possession during coverture: *Magee v. Young*, 40 Miss. 164, 90 Am. Dec. 322. The Pennsylvania statute of 1848, relative to the rights of a wife in the husband's estate, is given no retroactive operation and violates no vested rights by being applied to the estate of one who died after its passage: *Melizet's Appeal*, 17 Pa. St. 449, 55 Am. Dec. 573. While the courts favor dower, the rule should not be carried so far as to impair vested rights, by giving a statute concerning dower a retrospective operation: *Davis v. O'Ferrall*, 4 G. Greene, 168. Statutes restoring to married women the common-law right of dower are unconstitutional so far as they apply to marriages contracted previous to their passage: *Wesson v. Johnson*, 66 N. C. 189; *Sutton v. Askew*, 66 N. C. 172, 8 Am. Rep. 500. And a curative statute to make good the deed of a married woman, releasing her dower, but defectively acknowledged, does not revive and validate the deed as against the wife, though the statute might make the deed good as against the husband's heirs: *Grove v. Todd*, 41 Md. 633, 20 Am. Rep. 76. A statute providing for divesting out of the purchaser of land one-third of the fee, and vesting the same in the widow of his deceased grantor, is unconstitutional: *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200, cited in *Morton v. Noble*, 22 Ind. 162; *Hoskins v. Hutchings*, 37 Ind. 324; *Bowen v. Preston*, 48 Ind. 367; *Taylor v. Sample*, 51 Ind. 423; *Carr v. Brady*, 64 Ind. 28; but



not questioned or doubted, and held to be the law of the state: See *Taylor v. Sample*, 51 Ind. 423. The right to dower accrues at the time of the husband's death, and becomes a vested right before assignment. It cannot, therefore, be taken away or reduced by statute, after the death and before assignment: *Burke v. Barron*, 8 Iowa, 132; contra, that before assignment a widow has no estate in the lands of her husband: *Lawrence v. Miller*, 2 N. Y. 245. A statute which seeks to impair or take away dower which has been assigned to the widow is, of course, unconstitutional: *Talbot v. Talbot*, 14 R. I. 57.

The wife's measure of dower right is governed by the law in force at the time of her husband's death, and not that which was in existence at the time of the marriage, or of the husband's acquisition of the land: *Boyd v. Harrison*, 36 Ala. 533; *Ware v. Owens*, 42 Ala. 212, 94 Am. Dec. 642; *Hatcher v. Buford*, 60 Ark. 169, 29 S. W. 641; *Noel v. Ewing*, 9 Ind. 37; *Bowen v. Preston*, 48 Ind. 367; *Lucas v. Sawyer*, 17 Iowa, 517; *Sturdevant v. Norris*, 30 Iowa, 65; *Bates v. McDowell*, 58 Miss. 815; *Guerin v. Moore*, 25 Minn. 462; *Thomas v. Hesse*, 34 Mo. 13, 84 Am. Dec. 66.

As a wife is not entitled until her husband's death, the condemnation of lands to public use, under the right of eminent domain, discharges any inchoate right of dower in the wife of the owner of the fee: *Moore v. Mayor*, 8 N. Y. 110, 59 Am. Dec. 473; *French v. Lord*, 69 Me. 537; *Duncan v. Terre Haute*, 85 Ind. 106; *Chouteau v. Missouri Pac. Ry. Co.*, 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; *Venable v. Wabash Western Ry. Co.*, 112 Mo. 103, 20 S. W. 493. Contra, *Nye v. Taunton etc. R. R. Co.*, 113 Mass. 277; and see *Wheeler v. Kirtland*, 27 N. J. Eq. 534. And a statute which provides that a widow shall not be entitled to an interest in lands conveyed by the husband, when the wife, at the time of the conveyance, was a nonresident of the state, does not contravene the federal constitution: *Buffington v. Grosvenor*, 46 Kan. 730, 27 Pac. 137; *Bennett v. Harms*, 51 Wis. 251, 8 N. W. 222. If a husband conveys land, at a time when the right of dower exists, without joining with his wife in the deed, and, at the time of his death, dower has been abolished, the widow is not entitled to dower in the land so conveyed: *Richards v. Bellingham Bay Land Co.*, 54 Fed. 209.

Under the statutes of Nebraska, a widow cannot be deprived of dower in the lands of which her husband died seised without her consent, and, on the death of her husband intestate, a widow's inchoate right of dower, which, up to that time, was a mere lien, charge, or encumbrance upon the real estate of her husband, becomes her absolute estate, free from the payment of the ordinary unsecured debts of the intestate: *Motley v. Motley*, 53 Neb. 375, 68 Am. St. Rep. 608, 73 N. W. 738. After an assignment of dower, following the husband's death, the widow cannot be deprived of her estate, except by operation of the statute of limitations in certain

cases, without her consent expressed in the mode pointed out in the statute: *Walsh v. Reis*, 50 Ill. 477; and an unconstitutional law does not affect her right to dower, though her husband died after its adoption but before it was adjudged to be unconstitutional: *Motley v. Motley*, 60 Neb. 593, 83 N. W. 830. The half-interest in community property, under the California statute, is a substitute for the common-law right of dower: *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125.

The wife's right to dower which is vested in her prior to a divorce is not divested thereby, unless the statute has so specially declared: *Van Cleef v. Burns*, 118 N. Y. 549, 16 Am. St. Rep. 782, 23 N. E. 881. The statute of Ohio, giving to a divorced wife a right of dower in the real estate of the husband not allowed her as alimony, is enabling in its character. It creates no disability, nor does it impose any restraint on the power of the divorced wife to release her dower right, in any lawful mode, either when the divorce is granted or at any time thereafter: *Julier v. Julier*, 62 Ohio St. 90, 78 Am. St. Rep. 697, 56 N. E. 661.

**VIII. Statutes Impairing the Marital Obligation.**—Marriage is mainly an institution of the state, founded on reasons of public policy; and, while it is in some respects a contract, it is not within the constitutional interdiction of legislation impairing the obligation of contracts: *Magee v. Young*, 40 Miss. 164, 90 Am. Dec. 322; *Cabell v. Cabell*, 1 Met. (Ky.) 319; *Maguire v. Maguire*, 7 Dana, 181, 184; *Carson v. Carson*, 40 Miss. 349. Hence, the legislature has the general right to legislate on the subject of divorce: *Carson v. Carson*, 40 Miss. 349; *State v. Duket*, 90 Wis. 272, 48 Am. St. Rep. 928, 63 N. W. 83; except where it is prohibited by the constitution. The validity of legislative divorces has ceased to be a question of practical interest, as the constitutions of a majority of the states directly prohibit the legislature from granting divorces by special act: See the monographic note to *Gaines v. Gaines*, 48 Am. Dec. 437-439, on the constitutionality of legislative divorces.

Property rights arising out of the marital relation are subject to legislative control, without violating the fundamental principle which prohibits the passage of any law impairing the obligation of contracts: *State v. Duket*, 90 Wis. 272, 48 Am. St. Rep. 928, 63 N. W. 83; *Blood v. Humphrey*, 17 Barb. 660; *Pritchard v. Citizens' Bank*, 8 La. 130, 28 Am. Dec. 132; *Magee v. Young*, 40 Miss. 164, 90 Am. Dec. 322; *Taylor v. Stockwell*, 66 Ind. 505; *Currier v. Elliott*, 141 Ind. 394, 39 N. E. 554; *Sleight v. Read*, 18 Barb. 159; and see *Voltz v. Rawles*, 85 Ind. 198; *Parkham v. Vandeverter*, 82 Ind. 544; monographic note to *Barnet v. Barnet*, 16 Am. Dec. 518-520, on the constitutionality of acts validating contracts and deeds of married women.

**IX. Statutes Changing Rights by Descent.**—The law of descent and distribution, until the death of the ancestor, may be molded according to the will of the legislature: *Randall v. Kreiger*, 23 Wall. 137, 148; *Henson v. Moore*, 104 Ill. 403. The Mississippi act of 1840, Am. St. Rep., Vol. LXXXIV—29

providing for the wife's descent of slaves did not impair vested rights and was valid: *Marshall v. King*, 24 Miss. 85. When a married woman dies intestate, and without descendants or ancestors, her personal property goes to her husband at common law, and this rule has not been changed by the various married women's acts: *Robbins v. McClure*, 100 N. Y. 328, 53 Am. Rep. 184, 3 N. E. 663. Compare the monographic note to *In re Ingram*, 12 Am. St. Rep. 81-113, on succession to estates of intestates.

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### KEISER v. SHAW.

[104 Ky. 119, 46 S. W. 524.]

#### ATTACHMENT—GARNISHMENT—ANNUITY FOR LIFE.

An obligation for one person to pay another a certain sum of money annually, for life, is subject to garnishment by the latter's creditors.

E. W. Hawkins, for the appellants.

L. J. Crawford, for the appellee.

120 PAYNTER, J. The evidence in this case authorized the court to refuse to set aside the deed which Mrs. Keiser made her son William Gates for land, and also the one which she made to Munch and wife. In consideration of the payment of certain sums by the grantees, and the further consideration that her son William pay her one hundred dollars per annum during her life, and that Munch and wife would pay her a like sum per annum during her life, the deeds were made.

It is insisted that the two hundred dollars which was to be paid annually by the grantees to Mrs. Keiser is not subject to attachment by her judgment creditors, because it is too uncertain and intangible; that it is a contingent liability. The amount which the vendees will ultimately have to pay Mrs. Keiser is uncertain, because the time of her death cannot be foretold. It is, however, certain that they are to pay two hundred dollars per annum, and that liability continues until her death, which is an event that is certain to happen. The liability of the vendees cannot be terminated at their will. They cannot prevent its enforcement. Hence their liability is fixed and certain. Their liability does not become fixed by a contingent event, but it is, however, to be terminated when a certain event happens. If the vendees had failed to pay the sums which they had severally contracted to pay Mrs. Keiser, the court could have, by appro-



priate proceedings, enforced them. The debt which the vendees owe Mrs. Keiser is no more intangible than any other chose in action. Counsel for appellants cites section 555 of Drake on Attachments to sustain his position. It is said by the author, in that section, "that, when it is contingent whether the garnishee will ever owe the defendant money, he cannot be made liable." We think this is a well-settled doctrine. In <sup>121</sup> this case the parties are not to become indebted on the happening of any event, and they are indebted to the defendant, and their liability is to continue until the happening of an event. The court simply adjudged that the garnishees, the vendees, pay the two hundred dollars annually into court, to be applied to the payment of the creditors' debts, until they were paid, or until Mrs. Keiser's death, if it should sooner happen. The appellees had obtained a return of nulla bona. The appellee Mrs. Holz did not only try to have the deed which Mrs. Keiser had made set aside, but she sought to subject to the payment of her judgment choses in action, equitable and legal interests, etc. The fact that she did not succeed in having the deed set aside did not deprive her of the right to other relief sought. Shaw, in an amended petition, asked that the deeds be canceled. If that could not be done, then he asked that the sums due by William Gates and Munch and wife to Mrs. Keiser be subjected to the payment of his debt.

The judgment is affirmed on original and cross appeals.

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**Garnishment.**—A liability contingent on a future, uncertain event is not subject to garnishment: *Lehmann v. Farwell*, 95 Wis. 185, 60 Am. St. Rep. 111, 70 N. W. 170. An indebtedness is not liable to garnishment unless absolutely due as a money demand: *Holker v. Hennessey*, 143 Mo. 80, 65 Am. St. Rep. 642, 44 S. W. 794. Compare *Phenix Ins. Co. v. Willis*, 70 Tex. 12, 8 Am. St. Rep. 566, 6 S. W. 625. Garnishment reaches only such demands as the defendant could, in his own name, recover in an action of debt or indebitatus assumpsit: *Skewes v. Tennessee etc. R. R. Co.*, 124 Ala. 629, 82 Am. St. Rep. 214, 27 South. 435.

## STONE v. COMMONWEALTH.

[104 Ky. 220, 46 S. W. 721.]

**EMBEZZLEMENT—AGENT OF INSURANCE COMPANY—WHO IS NOT.**—Although a state agent of an insurance company permits and authorizes a person to write a particular risk, under a special contract, such person is not “an agent or servant” of the company, within the meaning of a statute prescribing a punishment for embezzlement, where the company knows nothing of him beyond seeing his name on the application as solicitor.

**EMBEZZLEMENT—PART OF MONEY DUE AS A COMMISSION.**—A person who receives money, a portion of which belongs to himself as a commission on the whole amount, is not guilty of embezzlement, though he converts the whole to his own use.

Little & Little, for the appellant.

W. S. Taylor, attorney general, and La Vega Clemments, for the appellee.

**222 HAZELRIGG, J.** The appellant was tried and convicted for embezzlement of the funds of the National Life Association of Hartford, Connecticut, under the following statute: “If any officer, agent, clerk, or servant of any bank or corporation shall embezzle, or fraudulently convert to his own use or to the use of another, bullion, money, bank notes, or any effects or property belonging to such bank or corporation, or other corporation or any person, which shall have come to his possession or been placed in his care or under his management as such officer, agent, clerk, or servant, he and the person to whose use the same was fraudulently converted, if he assented thereto, shall be confined in the penitentiary not less than one nor more than ten years”: Ky. Stats., sec. 1202. On the trial it appeared that appellant was the regular agent at Owensboro for the Fidelity Mutual Insurance Company of Philadelphia; but, learning that certain risks might be written in the Hartford company which could not be accepted in his own company, he, in connection with one Gant, who was an agent for the New York Equitable, procured an application for a ten thousand dollar policy from one Thomas Soaper, appellant having first obtained permission and authority to do so from Gathright, the state agent of the Hartford company at Louisville. The application was signed by appellant as solicitor, and Gathright was informed at the time it was forwarded to him that Soaper’s note, amounting to six hundred and eighty-eight dollars, would be

taken and discounted, and, after retention of forty per cent thereof for appellant and Gant's share, the balance would be sent to Gathright. <sup>223</sup> The application was forwarded to the company by Gathright, and the risk accepted, and the policy issued. Thereupon appellant and Gant discounted the Soaper note, which was payable to appellant, at one of the banks of the city. Of the proceeds, Gant was paid his twenty per cent. Appellant then appears to have bought New York exchange, to the amount of sixty per cent, to be sent to Gathright, who, it seems, was to retain thirty per cent, leaving thirty per cent for the company. He left the country, however, and the money was never sent.

It is clear, we think, that appellant was not, within the meaning of the statute, the agent of the Hartford company, having in his possession, care, or management, money, bonds, notes, or effects belonging to that company. The company never had him employed, and heard nothing of him, beyond seeing his name on the application as solicitor. The simple arrangement was that appellant and Gant, as solicitors under special contract with Gathright, were to forward the application of Soaper to Gathright, take the note of the insured, and, as joint owners of the proceeds, discount the paper, and forward the balance to other owners. The rule seems to be well settled that "in all cases where one receives money, a portion of which belongs to himself as a commission on the whole amount, he is not guilty of embezzlement, though he converts the whole to his own use": 6 Am. & Eng. Ency. of Law, 475, and numerous cases cited. It is different if the whole fund collected belongs to the company, the agent getting his commission in the nature of a rebate out of the sum actually paid over: *Clark v. Commonwealth*, 16 Ky. Law Rep. 704, 29 S. W. 973. We do not think section 633 of the statute, under the head of "Private Corporations," and defining and regulating the conduct of insurance companies in this state, and providing that, notwithstanding <sup>224</sup> an application for insurance may provide that the solicitor is agent of the insurer, he is yet the agent of the company, has any sort of application to the statute on embezzlement. Under the state of case presented, the peremptory instructions to find appellant not guilty should have been given.

Wherefore the judgment of the lower court is reversed, and the cause remanded for proceedings consistent with this opinion.

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**Embezzlement.**—A right to deduct commissions out of an amount received gives one such an interest therein that he cannot be con-



victed for the embezzlement of it. But a mere right to receive payment in commissions, which the employé has no right to deduct, but which are paid him by his employer, does not create in him an interest in the fund that will prevent conviction: See the extended note to *Calkins v. State*, 98 Am. Dec. 137, on embezzlement.

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## SINKING FUND COMMISSIONERS v. GEORGE.

[104 Ky. 260, 47 S. W. 779.]

**CONSTITUTIONAL LAW—BURDEN OF PROOF.**—It is for those who question the constitutionality of a statute to show that it is either expressly or impliedly forbidden by the constitution.

**CONSTITUTIONAL LAW—APPOINTMENT TO OFFICE—NATURE OF FUNCTION OF.**—The selection of a board of penitentiary commissioners for a state is not essentially an executive function. Hence, a statute creating such a board, and conferring upon the legislature the duty of appointing the commissioners, whose duties are defined by the act, is not unconstitutional.

**STATUTE — VETOED BILL, WITH EMERGENCY CLAUSE, BECOMES A LAW, WHEN.**—When a bill, with an emergency clause, is vetoed by the governor, it becomes a law, under the constitution of Kentucky, immediately upon its passage over his objections.

**CONSTITUTIONALITY OF LAW—LEGISLATIVE ELECTION OF OFFICERS.**—A statute which authorizes the legislature, independent of the governor's voice, to elect a board of penitentiary commissioners, does not require separate action by the two houses; nor is it necessary that a resolution for joint action should be approved by the governor. If the commissioners receive a majority of the votes of both houses and of each house, they are elected.

**CONSTITUTIONALITY OF LAW—STATUTES, WHEN GOOD IN PART AND BAD IN PART.**—If the unconstitutional portion of an act can be stricken out, leaving that which remains complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained.

**CONSTITUTIONAL LAW—STATUTES AS TO TERMS OF OFFICE—WHEN GOOD IN PART.**—When the legislature, in creating offices, is limited to a term not exceeding four years, it violates the constitution by creating a six year term; but where an act provides that three members of the board of police commissioners are to be elected, one for the term of two years, one for four years, and one for six years, that part of the act which adds two years to the constitutional term of four years may be rejected without invalidating the remainder of the act, and there will be three commissioners, one of whom holds for a term of two years, and two hold for a term of four years each.

**STATUTES—REPEAL OF, AND ITS EFFECT UPON OFFICE HOLDERS.**—When a law, under which persons hold office at the legislative will, is repealed, their right to office ceases.

Section 89 of the Kentucky constitution, referred to in the opinion, provides for the presentation of bills and joint resolutions to the governor.

W. S. Pryor, W. H. Holt, and W. S. Taylor, for the appellants.

Bronston & Allen, for the appellees.

<sup>263</sup> PAYNTER, J. Several important constitutional questions are involved in this case. During the last session of the legislature, an act was passed, entitled "An act to create a board of penitentiary commissioners and regulate the penal institutions of this commonwealth." Section 1 reads as follows: "That a board of commissioners is hereby created to govern the penitentiaries of this commonwealth. Said board shall consist of three members, to be elected by the general assembly on or before the tenth day of March, 1898. One of whom shall hold his office, to be determined by lot of commissioners elected, for the term of two years, one for the term of four years, and one for the term of six years, or until their successors are elected and qualified." It is contended that the legislature could not constitutionally pass the act and elect the commissioners; that the election of the commissioners is an executive, not a legislative function. There is no express power conferred upon the executive department by the constitution to appoint such officers or agents which the general assembly may designate for the direction or control of the penitentiaries. Neither is such power implied from any provision of the constitution. There is no provision of the constitution which places any limitation on the power of the legislative department to name or select the officers or agents necessary to properly manage the penal institutions. Neither is there any provision of the constitution from which it can be <sup>264</sup> fairly implied that the legislative department shall not elect or select those who may aid or control in the conduct of the affairs of the penal institutions. When the constitution has imposed no limits upon the legislative power, it must be considered practically absolute. Plenary power in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is the exception. When one questions the legislative power to pass a statute, he should show that the constitution expressly prohibits its enactment, or that such prohibition is fairly implied from its provisions. The court said in the case of Slack v. Maysville etc. R. R. Co., 13 B. Mon. 22, that: "It would be difficult, perhaps impossible, to define the extent of the legislative power of the

state, unless by saying that, so far as it is not restricted by the higher law of the state and federal constitutions, it may do everything which can be effected by means of a law. It is the great, supervising, controlling, creative, and active power in the state, subject to the fundamental restrictions just referred to. Whatever legislative power the whole commonwealth has is by the constitution vested in the legislative department, which, representing the popular majorities in the several local divisions of the state, and under no other restraint but such as is imposed by the fundamental law, by its own wisdom, and its own responsibilities, may regulate the conduct and command the resources of all, for the safety, convenience, and happiness of all, to be promoted in such manner as its own discretion may determine. The legislative department performs and finishes its office by the mere enactment of a law. It does not of itself carry the law into operation. This <sup>265</sup> is necessarily done by extrinsic agencies. The law, being made known, may be universally observed or obeyed. It may be enforced by the judiciary, or by the co-operation of the judiciary and the executive. These are the regular agencies provided by the constitution for the execution of the laws. But the legislature is not restricted to these agencies. It may select or appoint others, as is often done, when the object of the law is to accomplish local or individual purposes. The agency generally employed for applying the legislative will and the power of the government to purposes merely local has been that of county courts for counties, and of the trustees of towns or the municipal authorities of cities for towns or cities, which, to the extent of the powers permanently or temporarily vested in them, and whether allowed a discretion or not, do but carry into effect the legislative will and power. But these local agencies are selected, and some of them created, by the legislature itself, for the purpose of carrying its power into all parts of the commonwealth, or into such parts as require its application for their benefit or coercion. And the legislature may select other agencies for particular purposes, having in view, as it must be presumed to have, the nature of the object to be accomplished, and the fitness of the agency selected." It was said in *People v. Draper*, 15 N. Y. 543, that: "The people, in framing the constitution, committed to the legislature the whole law-making power of the state which they did not expressly or impliedly withhold. Plenary power in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception. In



inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity <sup>266</sup> to show that it is forbidden. I do not mean that the power must be expressly inhibited, for there are but few positive restraints upon the legislative power contained in the instrument. . . . It follows that it belongs to the legislature to arrange and distribute the administrative functions, committing such portions as it may deem suitable to local jurisdictions, and retaining other portions to be exercised by officers appointed by the central power, and changing the arrangement from time to time as convenience, the efficiency of administration, and the public good may seem to require. If a particular act of legislation does not conflict with any of the limitations or restraints which have been referred to, it is not in the power of the courts to arrest its execution, however unwise its provisions may be, or whatever the motives may have been which led to its enactment. There is room for much bad legislation and misgovernment within the pale of the constitution; but, whenever this happens, the remedy which the constitution provides, by the opportunity for frequent renewals of the legislative bodies, is far more efficacious than any which can be afforded by the judiciary. The courts cannot impute to the legislature any other than public motives for their acts. If a given act of legislation is not forbidden by express words or by necessary implication, the judges cannot listen to a suggestion that the professed motives for passing it are not the real ones. If the act can be upheld upon any views of necessity or public expediency which the legislature may have entertained, the law cannot be challenged in the courts." Chief Justice Marshall said in *Fletcher v. Peck*, 6 Cranch, 87: "How far the power of the law may involve every other power, in cases where the constitution is silent, never has been, and <sup>267</sup> perhaps never can be, definitely stated." The general assembly is elected by the people. Presumably, it knows what laws should be enacted for their benefit, and for the public good. If a law is within constitutional limits, a court cannot intervene and declare it invalid because, in its opinion, the law is unwise. Upon this subject Mr. Cooley (*Cooley's Constitutional Limitations*, 200, 201) says: "The rule of law upon this subject appears to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not, in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are

secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people, in their sovereign capacity, can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them."

The legislative department for a great many years retained control over the penitentiary, and during that time, under the law then in force, elected the warden, who had the authority to select his subordinates. The <sup>208</sup> members of the constitutional convention well knew that the legislature had been assuming that, under the constitution, it had the right to so control the penitentiary and elect the warden. Notwithstanding the legislature had been exercising the right to so elect the warden, the framers of the present constitution failed to place an inhibition in it against the exercise of such power by the legislature. Besides, it is provided in section 93 of the constitution that "inferior state officers, not specifically provided for in this constitution, may be appointed or elected, in such manner as may be prescribed by law, for a term not exceeding four years, and until their successors are appointed or elected and qualified." Section 107 of the constitution provides that "the general assembly may provide for the election or appointment, for a term not exceeding four years, of such other county or district ministerial and executive officers as may, from time to time, be necessary." Under section 93 of the constitution, the legislature could not only provide for inferior state officers, but could designate how they should be appointed or elected. Section 27 of the present constitution provides how the powers of government of the commonwealth shall be distributed. Section 28 of the constitution declares that no person or persons of one department shall exercise any power belonging to either of the others, except as expressly directed or permitted. These sections are the same as sections 1 and 2, article 1, of the preceding constitution, except there has been

substituted in section 27 the word "confined" for the word "confided," which was in section 1 of the preceding constitution; but this change does not alter the meaning of the section. It is these sections upon which counsel for the appellees rely to show that the selection of <sup>269</sup> the board of commissioners is an executive function. These sections do not indicate a purpose upon the part of the framers of the constitution to limit the power of the legislature in the matter of selecting or electing officers or agents to carry out its will. We might add at this point that the legislature has also for a great many years elected a librarian. We have two instances in which the legislature has assumed the right to elect persons to fill positions which it has created. So far as we are aware, its right to have done so has never been questioned. The legislatures of many of the states of the Union have assumed to exercise substantially the same power as has the general assembly of Kentucky, in the matter of selecting or electing officers to fill positions which they had created. It was held in *People v. Freeman*, 80 Cal. 233, 13 Am. St. Rep. 122, 22 Pac. 173, that it can be done. Mr. Freeman, in his notes to that case (13 Am. St. Rep. 130), after reviewing the various decisions of the supreme courts, says: "The truth is that the power of appointing or electing to office does not necessarily or ordinarily belong to either the legislative, the executive or judicial department. It is commonly exercised by the people, but the legislature may, as the law-making power when not restrained by the constitution, provide for its exercise by either department of the government, or by any person or association of persons whom it may choose to designate for that purpose. It is an executive function when the law has committed it to the executive, a legislative function when the law has committed it to the legislature, and a judicial function, or at least a function of a judge, when the law has committed it to any member or members of the judiciary. The legislature, unless inhibited by the constitution, may exercise its power in <sup>270</sup> either of the three modes: 1. It may, by a statute, create an office, and name persons who are to fill it: *State v. Seymour*, 35 N. J. L. 48; *Daley v. St. Paul*, 7 Minn. 390; *Mayor of Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572. 2. It may by law create an office, and provide that it shall be filled by election or appointment by the legislature in joint convention assembled: *People v. Langdon*, 8 Cal. 1; *People v. Fitch*, 1 Cal. 536; and the principal case. 3. It may, after creating an office, provide that it may be filled by appointment made by



any person or by the members of a voluntary association, as by the members of the chamber of commerce, and the presidents and vice-presidents of the marine insurance companies of a certain city, or by the members of the board of underwriters of such city; nor is it necessary that the persons thus designated be citizens of the United States, and authorized to vote as such: *Sturgis v. Spofford*, 45 N. Y. 446; *In re Bulger*, 45 Cal. 556."

It would make this opinion unnecessarily long to cite other authorities touching this question. We are of the opinion that the election of the commissioners was not essentially an executive function, and that the legislature had the right to elect them.

Before a bill can become a law on its final passage, it must receive the votes of at least two-fifths of the members elected to each house, and a majority of the members voting: Const., sec. 46. Section 88 prescribes the details as to how a bill shall be presented to the governor, as to his signing, or his return of it with his objections, and as to how it can become a law notwithstanding the veto, or his failure to sign it. Section 55 of the constitution reads as follows: "No act, except general appropriation bills, shall become a law until ninety days <sup>271</sup> after the adjournment of the session at which it was passed, except in cases of emergency, when by the concurrence of a majority of the members elected to each house of the general assembly, by a yea and nay vote entered upon their journals, an act may become a law when approved by the governor; but the reasons for the emergency that justifies this action must be set out at length in the journal of each house." It is contended that although there is an emergency clause in the bill, and passed by the two houses as the constitution requires, it cannot become a law for ninety days unless the governor approves it. If the constitutional convention had intended that the will of the governor was to control in the matter of declaring an emergency, it would simply have said that the governor may declare an emergency, and put the act in force at once. We do not think the language and the spirit of the constitution make the approval of the governor a condition precedent to the taking effect of an act. The legislature can pass a bill, and it can, by the plain provisions of the constitution, become a law without the governor's approval. There may be a great necessity that the act should immediately become a law. And as the legislature can pass a bill against the objections of the governor, it seems to us that it was never intended that the governor should have

the power, by withholding his approval, to prevent the act from taking effect for ninety days after the adjournment of the general assembly which passed the act. The governor can delay the time when the bill shall become a law ten days, by holding the bill without signing or returning it. It seems to us when an act becomes a law without his approval, it would be strange construction of the constitution <sup>272</sup> to allow the time to be postponed when it would take effect because the governor did not approve it. The governor vetoed the bill. It contained the emergency clause. The general assembly had the same power to pass the bill with an emergency clause as it had to pass it without such clause. And the clause was effective to put in operation the act. We think the language used, to wit, "when approved by the governor," refers to the time when the act would take effect if approved by him. However, when he disapproves it, then it does not take effect, unless passed, as the constitution requires, over his objection. This being done, it became a law immediately, if the legislature had declared an emergency. By considering sections 55 and 88 together, we think the conclusion we have reached is correct.

It is claimed that the commissioners could not have been elected except by the respective bodies of the general assembly, in their separate capacity, the senate and house concurring therein; that the joint resolution authorizing a meeting of the joint assembly for the purpose of electing the commissioners should have been approved by the governor before it went into effect; and that the vote cast in the election of the commissioners, also, should have been approved by him. The act authorized the general assembly to elect the commissioners on or before the 10th of March, 1898, regardless of the wishes of the governor. It was passed over his objections. By the terms of the act, it could meet at any time on or before that date. By a motion in each house a time could have been designated when the members of the general assembly could meet in joint session to elect the commissioners. The joint resolution simply answered the purpose of such <sup>273</sup> motion. That being the purpose of the joint resolution of the two houses, it certainly was not necessary to obtain the approval of the governor, because the general assembly had, by the passage of the act, been empowered to elect the commissioners. The governor could not invalidate the election by his disapproval of the result. The act gave him no voice in the election. Had the general assembly intended that the election of the commissioners should be sub-

ject to the approval of the governor, it would have probably conferred upon him the right to appoint them. We are of the opinion that any action, either by motion, order, or resolution, which the senate and house might have taken with a view of meeting in joint session to elect the commissioners, could be done without presenting it to the governor. The governor's official connection with the matter ceased when the bill became a law. We are of the opinion that section 89 of the constitution was not violated when the general assembly proceeded to the election of the commissioners without the approval of the governor. The bill became a law on the fifth day of March, 1898—five days before the last day upon which the election should take place. If the views of counsel for appellants are correct, the governor could have prevented an election under the act, and thus destroyed it, by simply holding for six days a resolution fixing the time when the general assembly should meet in joint session to elect the commissioners. He could not prevent the bill from becoming a law by vetoing it, yet he could defeat its operation by failing to approve the resolution, or the result of the vote. We cannot agree that counsel's views on the question are correct. The commissioners <sup>274</sup> received a majority of the votes of both houses and of each house, and were duly elected.

As the term of Finnell and that of all others elected as successors are for six years, does it follow that the whole act is void. Whether the commissioners are officers or administrative agents it is not necessary to decide, but we will assume they are officers. Under the provisions of the constitution, the legislature was not authorized to fix the terms of officers exceeding four years. The manifest purpose of the act was to take from the commissioners of the sinking fund their control and management of the penitentiaries of the state; and it is equally as clear that the legislature intended to assume the control and management of the penitentiaries, and to accomplish that purpose through the instrumentality of the board of commissioners which it created. The general assembly manifested a purpose that one of the terms should be two years, and another should be for four years, and the right to fix these terms cannot be questioned. The language employed shows that the general assembly was willing that one of the commissioners should hold his office for six years—two years longer than the constitution will permit. As the general assembly expressed a willingness that one of the commissioners should hold for two years longer than the con-



stitution permits, it is certainly reasonable to conclude that it was the will of that body that the commissioners should hold for four years, as this term is necessarily included in the longer one which it fixed. To hold the act void in so far as it makes the term six years instead of four, still the balance of the act is complete and enforceable. The purpose and intent of the general assembly, that the commissioners should manage and control the penitentiaries, <sup>275</sup> can be effectuated by eliminating from the act that part which attempted to make terms six instead of four years. If the constitution had expressly required that the terms of officers should be fixed at exactly four years, and the general assembly had fixed the terms of the commissioners, respectively, at one, two, and three years, then we could not hold that it was its intention that they should hold for terms of four years. In such state of case, the very fact that the legislature provided that the terms should be less than that fixed in the constitution would be a manifestation of an unwillingness of the general assembly to create the offices and fix their terms at four years. It is different in this case. The general assembly has not only shown a willingness that the terms shall be as much as four years, but that they shall be six. If the unconstitutional portion of an act can be stricken out, and that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained. When that part of the act which adds two years to the constitutional term of four years is rejected, there will be three commissioners, one of whom shall hold for a term of two years, and two for a term of four years each, and, in the language of the act, holds "until their successors are elected and qualified." They are the commissioners whom the general assembly have elected to execute its will as expressed in the act. The commissioners hereafter elected by the general assembly under the act shall hold their office for four, instead of six, years; or, if the general assembly desires that the management of the penitentiaries shall be by commissioners, it can make such provisions as it pleases for their election. <sup>276</sup> It is said by Mr. Cooley in his work on Constitutional Limitations (211) that: "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are

essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated, within the meaning of this rule. If a statute attempts to accomplish two or more objects and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion."

There can be no doubt that the act repeals the law which made the commissioners of the sinking fund ex officio directors of the penitentiaries, and vested in the board of commissioners the power to manage and control the affairs of the penitentiaries of the state. Upon the election and qualification of the members of the board of commissioners all authority which was vested in the commissioners of the sinking fund to appoint and remove officers and employés of the penitentiaries ceased, and at that moment the board of commissioners was vested with all the powers which the act conferred upon them. <sup>277</sup> At the same time the right of the officers and employés of the penitentiaries ceased. "A warden for each penitentiary shall be elected by the said commissioners": Sec. 2. "It shall be the duty of the commissioners, if at any time they deem it necessary, to appoint a deputy warden for each penitentiary": Sec. 6. "The commissioners shall appoint a clerk for each penitentiary": Sec. 7. "The commissioners shall appoint a chaplain for each penitentiary": Sec. 9. These requirements as to the appointment of persons to fill the positions named are in accordance with the purpose of the general assembly to constitute another authority to govern the penitentiaries. The express authority to elect a warden and to appoint persons to the other positions named shows the legislative intent to be that those who then held the positions could no longer do so, and the fact that they did so hold them did not place any restrictions on the board of commissioners in the matter of electing a warden and in the appointment of a clerk, deputy warden, physician, and chaplain. The general assembly repealed the law which authorized the commissioners of the sinking fund to control the management of the penitentiaries, and at the same

time, notwithstanding the commissioners of the sinking fund had elected a warden, appointed a deputy warden, clerk, physician, and chaplain in effect declared that the board of commissioners should elect a warden, and appoint persons to the other positions. The authority which the general assembly gave the commissioners to elect a warden and appoint persons to the positions named forces the conclusion that those then holding the positions could not continue to do so unless elected or appointed by the board of commissioners. The act made it the duty of the <sup>278</sup> board of commissioners to appoint a deputy warden "if at any time they deemed it necessary." If the person holding the place had the right to hold it during the time for which he was appointed, then the board of commissioners might deem it wholly unnecessary to have a deputy warden; still he would continue to hold his place, if the position of counsel for appellant be correct. It was by an act of the general assembly that the commissioners of the sinking fund were made directors of the penitentiaries, and by which their subordinate officers held their positions. They all held subject to the legislative will. That the general assembly could at any time repeal the law under which they held is no longer an open question in this state. In *South v. Commissioners of the Sinking Fund*, 86 Ky. 188, 5 S. W. 567, in speaking of the warden of the penitentiary, the court said: "The office in question was not a constitutional one. It is the creature of the legislature, and subject to its will." The act does not in express terms say that the offices are abolished, but it does repeal the law under which the officers were appointed. If the act under consideration had repealed the law under which they were appointed, without creating an authority to govern the penitentiaries, it could not be contended that the commissioners of the sinking fund and their appointees continued in office. Does the mere fact that the act which repeals the law under which they held their positions provides that the new authority shall call to their aid certain persons who may bear the same official designation and perform the same duties, operate to keep them in office? We think not.

The judgment is affirmed.

JUDGE DU RELLE DISSENTED, mainly on the ground that the act under consideration was "inherently vicious," as being an invasion by the legislative department of the powers and privileges of the executive. He looked upon it as an act tending to confuse the



powers of government. He referred to the division of the powers of government into three distinct departments, the legislative, the executive, and the judicial, each being confined, by the constitution, to "a separate body of magistracy"; and quoted section 28 of the constitution, which reads as follows: "No person, or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted," remarking that these provisions are peculiar to the constitution of Kentucky. He gave an interesting history of these provisions of the organic law of that state, mentioning the fact that Thomas Jefferson had, when Virginia was about to permit Kentucky to become a separate and independent state, advised that the Kentucky constitution should contain an article confining each of the three departments of government within its own proper sphere, as he considered that there was danger in the federal constitution, because the clause defining the powers of the departments of government was not sufficiently guarded. Mr. Jefferson drew a form for this provision and it was adopted by the convention. The dissenting judge then discussed an act passed at the first session of the second federal Congress, which conferred executive powers upon the judiciary, and which the federal judges, in a number of the circuits, refused to obey. The judges of the circuit court for the district of New York regarded themselves as commissioners designated by the act, and at liberty to accept or decline the office, but they consented to execute the act in the capacity of commissioners: See the note to *Hayburn's Case*, 2 Dall. 409, wherein it was held that Congress has no power to assign to the judiciary any but judicial duties. This act of March 23, 1792 (1 U. S. Stats. 243) provided that the circuit courts and the district judges should perform the executive duty of making a list of invalid pensioners—should investigate the facts, and make a list of names of persons entitled to pensions under the act. But the obnoxious law was soon repealed.

The learned judge then proceeded to show what had been done in the principal case—namely, that the legislature, instead of prescribing the manner in which inferior state officers, not specifically provided for in the constitution, might be appointed or elected, as authorized by section 93 of the constitution, had undertaken to authorize their appointment by itself. He had little doubt that the penitentiary commissioners were "officers," within the meaning of the constitution, because an individual invested with some portion of the functions of the government, to be exercised for the benefit of the public, is a public officer. But he said that appointment to office had been held by the court of appeals of Kentucky to be "intrinsically executive." "It is," said he, quoting from Robertson, C. J., in *Taylor v. Commonwealth*, 3 J. J. Marsh. 401, "essentially executive, whensoever or by whomsoever exercised. It is as much executive when exercised by the courts as by the governor. It is the prerogative of appointing to office, and is of the same nature,

whether it belonged to a court or to a governor." He alluded to the division of authorities concerning the power to fill offices, "but the reasoning of the authorities," he said, "appears to me to be entirely against the proposition that the legislature can create an office, and by the same act name the person who is to fill it—a proposition distinctly decided in the affirmative in the opinion of the majority—or can fill such an office by any subsequent act or vote."

He then commented upon the evils of such legislation. "One legislature," said he, "enacts a law or two creating offices, and appoints the incumbents to those offices. Such legislation being upheld by the courts, the next legislature will go further, for it is not of record that any legislature has voluntarily relinquished powers of this character. The result will inevitably be that in time the brief period permitted by the constitution for legislative session will be entirely occupied in devising and creation of new offices, and in shameless trafficking in votes to secure appointments to office."

"It is instructive to consider in this connection the fact that under the federal constitution, which contained no direct inhibition against the exercise of the powers of one department by persons connected with another, such as is contained in our constitution, the federal Congress has never passed an act creating an office, and at the same time filled the office, and has never attempted it but once. I attach little importance to the fact that the librarian has for many years, without protest, been elected by the legislature; for the powers and duties of the librarian may, without any great stretch of judicial interpretation, be construed to make that officer an officer of the general assembly. Nor does it seem to me that the fact that the legislature at one time elected a warden of the penitentiary should be held decisive of this case, when the constitutionality of that legislation was never called in question before the courts.

"I regard this legislation," he said, in conclusion, "as the first flagrant act in the destruction of the barrier against confusion of powers of government which was provided by the wisdom of Mr. Jefferson for the first-born daughter of Virginia." Judge Burnam concurred in this dissent.

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**Every Legislative Act is Presumed Constitutional, and every intendment must be indulged by the courts in favor of its validity:** Alabama etc. R. R. Co. v. Reed, 124 Ala. 253, 82 Am. St. Rep. 166, 27 South. 19.

**Part of a Statute may be Void and another part valid:** State v. Santee, 111 Iowa, 1, 82 Am. St. Rep. 489, 82 N. W. 445.

**The Power to Appoint to Office does not belong exclusively to the executive branch of government, but in some instances may be exercised by the legislature:** State v. George, 22 Or. 142, 29 Am. St. Rep. 586, 29 Pac. 356. This power does not necessarily belong to either the legislative, executive, or judicial departments. The function is legislative, executive, or judicial when the law has confided its exercise to the legislative, executive, or judicial department of government: Fox v. McDonald, 101 Ala. 51, 46 Am. St. Rep. 98, 13 South. 416. See, further, the extended note to People v. Freeman, 13 Am. St. Rep. 130-147; Erwin v. Mayor, 60 N. J. L. 141, 64 Am. St. Rep. 584, 37 Atl. 732.

## KENTUCKY REFINING CO. v. GLOBE REFINING CO.

[104 Ky. 559, 47 S. W. 602.]

**ATTACHMENT OF GOODS CONSIGNED TO ONE'S OWN ORDER.**—A consignor consigning property to his own order, with directions to notify the purchaser thereof, and sending a draft, with a bill of lading attached, requiring payment of the draft before the bill of lading is delivered, does not part with his title to the property until the draft is paid. Hence, one who attaches the property before such payment acquires a lien not defeated by a subsequent payment of the draft.

Arthur M. Rutledge, for the appellant.

Richards, Baskin & Ronald, for the appellee.

<sup>561</sup> **GUFFY, J.** The appellant was a corporation doing business in the city of Louisville, and engaged in refining cotton-seed oil. The appellee was a corporation doing a like business in <sup>562</sup> said city. The Marlin Oil Company was a corporation doing business in Texas, and engaged in the manufacture of crude cotton-seed oil. The appellant instituted suit against the Marlin Oil Company in the Jefferson circuit court, and in the petition it is alleged: That on the 1st of November, 1895, the defendant, the Marlin Oil Company, sold and agreed to deliver to the appellant 800 barrels of prime crude cotton-seed oil, to be shipped by the defendant from Marlin, Texas, to the plaintiff, in plaintiff's tanks, and upon plaintiff's order, at the price of nineteen cents per gallon of seven and a half pounds f. o. b. at the mill of defendant in Marlin, Texas, and plaintiff to pay for same by sight draft after arrival of bill of lading and inspection of said oil—the quality and weight of the oil guaranteed by the defendant. That after said 1st of November, 1895, the appellant had ordered the defendant to ship all of said oil from its mills in the town of Marlin to the plaintiff in the city of Louisville, and furnished to defendant its tanks therefor; but that the defendant broke its said contract, and refused to deliver said oil to the plaintiff, and refused to ship the same from its said mills, and has never furnished or shipped same. That plaintiff has been ready and willing to perfect its part of said contract, and to pay said purchase price for said oil, as agreed upon in said contract. That the quantity of said oil that defendant agreed to sell to plaintiff is 40,000 gallons. The plaintiff, relying on said contract and agreement of said defendant to deliver to it the said oil, made contracts to



sell and deliver said quantity of oil, with other oil it had, to its customers; but was unable to fulfill its contract except by purchasing other oil in lieu of said oil. That after said purchase by plaintiff the market price of said oil advanced two cents on each gallon, and is now worth two cents more, to wit, twenty cents per <sup>563</sup> gallon; and plaintiff was compelled to buy said quantity of oil from other parties, and pay therefor two cents per gallon more than said contract price, and was thereby compelled to pay for said oil purchased by it from other parties to fill said contracts, paying \$800 over and above the price at which defendant agreed to furnish said oil, and plaintiff was thereby damaged in the sum of \$800. Plaintiff further alleged that the defendant was indebted to it in the sum of \$257.29 on another account, the particulars of which were set out in the petition; for which sums plaintiff prayed judgment, and obtained an attachment against the property of the defendant, which attachment was issued November 30, 1895, and came to the hands of the sheriff of Jefferson county at 10:55 A. M., November 30th, and was executed at 11:45 A. M., by delivering a copy of the attachment to Theodore Goeper, an employé of the Louisville & Nashville Railroad Company, and who had said car of oil in his charge, and levied on one car of cotton-seed oil, and left same in charge of said Goeper. It further appears that after the levy aforesaid the plaintiff obtained an order of sale, and the oil was sold. On January 11, 1896, the appellee, the Globe Refining Company, filed its petition and sought to be made, and was made, a party to this action, and claimed to be the owner of the oil attached. It is alleged by the appellee that on the 25th of November, 1895, it received a telegram from the defendant, the Marlin Oil Company, in words and figures as follows: "Tank K. R. Co. two hundred twenty-six, seven hundred fifty-six, prime oil in Louisville. Draft returned by Kentucky Refining Co. Will you take it at nineteen cents? Answer." To which telegram the appellee replied as follows: "Telegram received. Will take Kentucky tank two twenty at nineteen cents. Rush documents." On the 26th of November, <sup>564</sup> 1895, appellee received the second telegram from the said Marlin Oil Company, as follows: "We confirm sale of tank two twenty. Forward papers to-day. Routing is care Katy to St. Louis. Final destination, New York City. Trying to locate tank. If in Louisville, answer, our expense." It is further alleged that by reason of said purchase appellee purchased said oil at the price aforesaid, making \$1,155.28. On

the 26th of November, 1895, the said Marlin Oil Company drew its draft, payable at sight, on petitioner, for said sum, to pay for said oil, and that appellee duly accepted said draft on the 30th of November, 1895, and thereafter paid same when due. Said two telegrams, also a copy of the reply of the petitioner, and the said sight draft, are filed herewith as part hereof, marked exhibits 1, 2, 3, and 4, respectively. Attached to said draft of November 26, 1895, was a bill of lading for said carload of oil, said oil having been shipped to the order of Marlin Oil Company. Said bill of lading was indorsed as follows: "On payment of attached draft, deliver to Globe Refining Co. Marlin Oil Co., by W. D. Keyser, Mgr." By said bill of lading said oil was routed and shipped by way of St. Louis to New York, and said oil passed through the hands of the Wiggins Ferry Company of St. Louis, and was transported by them to the city of Louisville to the Kentucky Refining Company, instead of to the city of New York, and the same was, by the railroad company bringing said oil from St. Louis, delivered to the Kentucky Refining Company, without any order or direction from the Marlin Oil Company, and without surrender of the bill of lading, and the attachment sued out herein purports to have been levied upon said oil. That after the appellee had paid the draft for the amount of said oil, it mailed said bill of lading to the Wiggins Ferry Company, with directions to <sup>565</sup> change routing of said carload of oil from New York to Louisville, and to deliver same to petitioner, said Wiggins Ferry Company having erroneously marked said bill of lading "Canceled." Said bill of lading is attached hereto, and marked "Exhibit No. 5." It is further alleged in the petition that appellee purchased the oil before the filing of this action, and before the suing out of the attachment, and paid said draft without knowledge of said attachment. Appellee prayed judgment for the value of the oil at the time of the suing out of the attachment, which it alleged was \$1,418.76.

Exhibit No. 1 reads as follows: "11-25-95. Marlin, Texas. Globe R. F. Co.: Tank K. R. Co., two hundred twenty-six seven hundred fifty-six gallons prime oil in Louisville. Draft returned by Kentucky Refining Co. Will you take it at nineteen cents? Answer. Marlin Oil Co."

Exhibit No. 2: "11-26-189—. Marlin, Texas. To Globe Refining Co., Lou.: We confirm sale of tank two twenty. Forward papers to-day. Routing is care Katy to St. Louis; des-

tionation New York City. Trying to locate tank. If in Louisville, answer, our expense. [Signed] Marlin Oil Co."

Exhibit No. 3: "Nov. 25, 1895. Marlin Oil Co, Marlin, Texas: Telegram received. Will take Kentucky tank two twenty at nineteen cents. Rush documents. [Signed] Globe Refining Co."

Exhibit No. 4: "First National Bank of Marlin, Texas. Nov. 26, 1895. At sight pay to the order of First National Bank of Marlin, Texas, \$1,155.28 (eleven hundred and fifty-five and 28-100 dollars), for value received, and charge to account of Marlin Oil Co., by J. W. R. Cinson, Secy.

"To Globe Refining Co., Louisville, Ky.

"Accepted by telephone, November 30, 1895, Globe Refining Co., by L. W. Motley, Third Nat. Bank."

<sup>566</sup> By an amended petition appellee alleged that the oil was of the value of \$1,601.38, and that it brought that sum at sheriff's sale January 27, 1896, and sought judgment against appellant for that sum.

The reply may be treated as a traverse of all the averments of the appellee showing it to be the owner and entitled to the oil at the time of the levy of the attachment. It is further alleged in the reply that, at the time of the pretended communication between defendant and appellee concerning the oil, the oil was in a tank belonging to appellant, and on the switch of the Louisville & Nashville Railroad Company in the yard of appellant, and that the same had been shipped and left there with the knowledge, consent, and direction of the Marlin Oil Company, the Marlin Oil Company then being indebted to the plaintiff to the amount and extent named in the petition; that the said Marlin Oil Company, when it shipped and caused said oil to be sent to plaintiff's said yard, as aforesaid, sent its draft on the plaintiff for the sum of \$——, for which it demanded payment before allowing the railroad company to deliver said oil to the appellant, and without paying or offering to pay or adjust its said indebtedness to the plaintiff, and plaintiff refused to accept or pay the amount of said draft until said Marlin Oil Company's indebtedness to it was satisfied, and plaintiff was then threatening and about to bring an action and sue out an attachment against said Marlin Oil Company to be levied upon said oil to satisfy its claim; that said Marlin Oil Company was at that time, and now is, a foreign corporation. The said Marlin Oil Company then, and for the purpose of defrauding this plaintiff, its creditor, and delaying plaintiff in the collection of



its debts against said Marlin Oil Company, commenced communication with the Globe Refining Company <sup>567</sup> to sell to it said oil, and that said pretended sale of oil to the appellee was made for the purpose and with the intention of defrauding plaintiff, and to hinder and delay it in the collection of its claim; all of which said appellee then well knew. In the third paragraph of the reply it is substantially alleged that before the pretended acceptance of said alleged draft by the appellee, and before any sale or delivery to it of the oil attached herein, said attachment had been placed in the hands of the sheriff of Jefferson county, and was then in the hands of the sheriff of Jefferson county, for execution, and plaintiff had acquired and then had a lien on said oil for its said debt. The appellee, in its rejoinder, in substance traversed all the affirmative averments contained in the reply. By an amended petition appellant claimed that it had to pay \$192.55 freight on said oil, for which it in any event asked credit. After the issues were finally made up, and proof taken, the court rendered judgment in favor of appellee for \$1,601.38, with interest from the day of sale, to wit, 27th of January, 1896, subject to a credit of \$195.22, freight paid, and further adjudged that appellee recover of the appellant its costs; and from that judgment appellant prosecutes this appeal.

The contention of appellant is that the title to the oil in contest was in the Marlin Oil Company, at the time of the issual and levy of the attachment, and, therefore, subject to seizure and sale in satisfaction of its claim against the Marlin Oil Company. It is also claimed by appellant that the alleged sale or transaction between appellee and the Marlin Oil Company was made to hinder or defeat the collection of appellant's claim. If either contention be true, the judgment appealed from should be reversed. It is unquestionably true that the appellee had some notice <sup>568</sup> of some dispute or disagreement between appellant and the Marlin Oil Company, and the proof conduces to show that the appellee had recognized a possibility, if not a probability, of the oil being attached by appellant, else it would not have imparted the information to the Texas company that the oil was not attached. But we are not inclined to hold that the proof establishes any fraudulent attempt upon the part of the appellee; hence the only question demanding serious or extended consideration is the question of title at the time of the levy of the attachment. Section 1908 of the Kentucky Statutes provides that: "Every voluntary alienation of or charge upon personal property, unless the actual possession, in good

faith, accompanies the same, shall be void as to a purchaser without notice, or any creditor, prior to the lodging for record of such transfer or charge in the office of the county court for the county where the alienor or person creating the charge resides." It is not, however, seriously contended that the statute *supra* affects the case at bar, because it is a well-recognized rule of law that there may be such a delivery of the kind of property now in question as will pass title to the purchaser without actual physical possession of the property being placed in the hands of the vendee. It will be observed that the oil in question was shipped first to the appellant, with draft attached to bill of lading. It, however, appears that upon failure of appellant to pay the draft the bill of lading was not delivered, and that afterward the Texas company had the transaction with the appellee as shown by this record. If the contract entered into between the appellee and the Texas company passed the title of the property to appellee, then the same was not subject to the attachment. If, however, the title remained in the consignor at the time of the seizure of <sup>569</sup> the property under the attachment, then the same was liable to seizure and attachment, and the judgment of the court below should be reversed. Counsel for both sides have filed able briefs, and cited numerous authorities. It seems to us that the weight of authority sustains the contention of appellant. It is said in *Hutchinson on Carriers*, section 130: "The consignee named in the bill of lading is presumptively the owner of the goods, and must be treated by the carrier as the absolute owner until he has had notice to the contrary; and a delivery to him without such notice will discharge the carrier. But if the party who claims the goods is not the consignee, he should be required to produce the bill of lading with the indorsement of the consignee, where the goods are deliverable to him or to his assigns, or of the shipper himself when the goods are shipped on his own account, and deliverable to his order. And where the goods are shipped deliverable to the order of the consignor, for and on account of the consignee, the carrier cannot deliver them to such consignee, except upon the production of the bill of lading, properly indorsed by the consignor, for this is notice to the carrier that the shipper intends to retain in his power the ultimate disposition of the goods." It is said in section 131, same author: "The practice of taking bills of lading providing for delivery to the shipper's own order has become very common, in order to use the bill of lading either as collateral or to obtain payment of

the goods before delivery." It appears from section 131a that the consignor had shipped goods consigned to itself, and inclosed to the supposed purchaser an invoice of the goods which stated on its face that the goods were shipped from Bay City, Michigan, via F. & P. M. R. R., to B. & L., with draft. They also drew on the purchaser for the price of the goods, <sup>570</sup> attached the bill of lading to the draft, and sent the draft on for collection. The purchaser exhibited the invoice to the agent of the carrier, and received the goods. He failed to pay the draft, and the carrier was held liable. "The title to the property," said Paxson, J., "remained in the consignor until delivery in accordance with the conditions. Bills of lading are symbols of property, and, when properly indorsed, operate as a delivery of the property itself, investing the indorsees with a constructive custody, which serves the purpose of an actual possession, and so continues until there is a valid and complete delivery of the property under and in pursuance of the bill of lading, and to the person entitled to receive the same. There can be no delivery except in accordance with the bill of lading. The invoice alone furnishes no proof of title." In Benjamin on Sales, fourth American edition, section 320, it is said: "To these may be added, thirdly, where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." It seems to be well settled that, if the vendor intends to retain the *jus disponendi* of the goods, the title never passes to the purchaser until all the requirements of the seller have been complied with. Sections 381 and 382 of Benjamin on Sales, fourth American edition, lay down the law as follows: "It has already been shown that the rules for determining whether the property in goods has passed from vendor to purchaser are general rules of construction adopted for the purpose of ascertaining the real intention of the parties, when they have failed to express it. Such rules, from their very nature, <sup>571</sup> cannot be applied to cases where exceptional circumstances repel the presumptions or inferences on which the rules are founded. However definite and complete, therefore, may be the determination of election on the part of the vendor, when the contract has left him the choice of appropriation, the property will not pass if his acts show clearly his purpose to retain the ownership, notwithstanding such appropriation. . . . (382) The cases



which illustrate this proposition arise chiefly where the parties live at a distance from each other, where they contract by correspondence, and where the vendor is desirous of securing himself against the insolvency or default of the buyer. If A, in New York, orders goods from B, in Liverpool, without sending the money for them, there are two modes usually resorted to, among merchants, by which B may execute the order without assuming the risk of A's inability or refusal to pay for the goods on arrival. B may take the bill of lading, making the goods deliverable to his own order, or that of his agent in New York, and send it to his agent, with instructions not to transfer it to A except on payment for the goods. Or B may choose to advance the money in Liverpool, and may draw a bill of exchange for the price of the goods on A, and sell the bill to a Liverpool banker, transferring to the banker the bill of lading for the goods, to be delivered to A on due payment of the bill of exchange. Now, in both these modes of doing the business it is impossible to infer that B had the least idea of passing the property to A at the time of appropriating the goods to the contract. So, that, although he may write to A and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice, stating plainly that these specific goods are shipped for A's account, and <sup>572</sup> in accordance with A's order, making his election final and determinate, the property in the goods will nevertheless remain in B, or in the banker, as the case may be, till the bill of lading has been indorsed, and delivered up to A. These are the most simple forms in which the question is generally presented; but we shall see that in this class of cases, as well as in that just discussed, it is often a matter of great nicety to determine whether or not the vendor's purpose or intention was really to reserve a *jus disponendi*."

In the case of *Dows v. National Exch. Bank of Milwaukee*, 91 U. S. 618, the supreme court of the United States had under consideration practically the same question involved in the case at bar, and we quote as follows from the syllabus of the opinion of the court in that case: "An invoice is neither a bill of sale nor evidence of a sale, and, standing alone, furnishes no proof of title. A party discounting a draft, and receiving therewith, deliverable to his order, the bill of lading of the goods against which the draft was drawn, acquires a special property in them, and has a complete right to hold them as security for the acceptance and payment of the draft. . . . Where neither the

evidence received nor offered tended to rebut the intent exhibited in the bill of lading, and confirmed throughout by the indorsement thereon, and the written instructions to retain the ownership of the wheat until payment of the draft. Held, that there was no necessity of submitting to the jury the question whether there had been a change of ownership." The supreme court of Ohio, in *Emery v. Irvine Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 306, said: "By the rules of commercial law a bill of lading is regarded as the symbol of the property therein described, <sup>573</sup> and in case the shipper reserves to himself the *jus disponendi*, he can transfer the title, at any time before the property is delivered by the carrier, to the consignee, as effectually by the delivery of the bill of lading as by delivery of the property itself. . . . On such question of intention, the terms of the bill of lading are to be taken as admissions of the consignor, and are entitled to great weight, but are not conclusive." In *Union Stockyards Co. v. Westcott*, 47 Neb. 300, 66 N. W. 419, it is, in substance, said that directions contained in the bill of lading to notify a certain person of the arrival of the shipment at the place of destination is not authority to the carrier to make delivery of such shipment to the persons to be so notified, without the production of the bill of lading. The supreme court of Arkansas, in *Berger v. State*, 50 Ark. 20, 6 S. W. 15, in substance, said: "The vendor who takes a bill of lading deliverable to his order, or that of his agent, manifests the intention to reserve the *jus disponendi* of the goods shipped in himself, and the title does not vest in the person for whom they are ultimately intended until actual delivery to him." In *Doyle v. Roth Mfg. Co.*, 76 Wis. 48, 44 N. W. 1100, the supreme court of Wisconsin in effect sustained the doctrine announced by the supreme court of Arkansas in the case *supra*. In *Bergeman v. Indianapolis etc. R. R. Co.*, 104 Mo. 77, 15 S. W. 992, the supreme court of Missouri, in substance, held that, in a sale of mules, the vendor receiving a small sum of money at the time, and drawing a draft for the balance of the purchase price on certain commission merchants to whom he consigned the mules, to be by them delivered to the vendee on payment of the draft, and not before, the possession remained in the vendor and his agents until the purchase price was <sup>574</sup> paid. In *Merchants' Nat. Bank v. Bangs*, 102 Mass. 295, the court, in discussing the question involved in the case at bar, used the following language: "In all completed contracts of sale, property in the goods sold passes to the buyer, although they may not have come into his

actual possession. An unconditional sale of specific chattels passes the title at once, and the buyer takes the risk of loss, and has the right to immediate possession. When anything remains to be done in the way of specifically appropriating the goods sold to the contract, the agreement is executory, and the property does not pass. When, from the nature of the agreement, the vendor is to make the appropriation, then, as soon as any act is done by him, identifying the property, and it is set apart with the intention unconditionally to apply it in fulfillment of the contract, the title vests, and the sale is complete. Thus the delivery to the buyer or his agent, or to a common carrier, consigned to him, whether a bill of lading is taken or not, if there is nothing in the circumstances to control the effect of the transaction, will be sufficient. If the bill of lading, or other written evidence of the delivery to the carrier, be taken in the name of the consignee, or be transferred to him by indorsement, the strongest proof is afforded of the intention to transfer an absolute title to the vendee. But the vendor may retain his hold upon the goods to secure payment of the price, although he puts them in the course of transportation to the place of destination, by delivery to a carrier. The appropriation which he then makes is said to be provisional or conditional. He may take the bill of lading or carrier's receipt in his own or some agent's name to be transferred on payment of the price, by his own or his agent's indorsement to the purchaser; <sup>575</sup> and in all cases when he manifests an intention to retain this *jus disponendi* the property will not pass to the vendee. Practically, the difficulty is to ascertain, when the evidence is meager or equivocal, what the real intention of the parties was at the time. It is properly a question of fact for the jury, under proper instructions, and must be submitted to them, unless it is plain, as matter of law, that the evidence will justify a finding but one way: *Allen v. Williams*, 12 Pick. 297; *Stanton v. Eager*, 16 Pick. 473; *Stevens v. Boston etc. R. R. Co.*, 8 Gray, 262; *Coggill v. Hartford etc. R. R. Co.*, 3 Gray, 545; *Moakes v. Nicholson*, 19 Com. B., N. S., 290; *Godts v. Rose*, 17 Com. B. 229; 1 Jur., N. S., 1173; *Tregelles v. Sewell*, 7 Hurl. & N. 574; *Benjamin on Sales*, 245." The same court, in *Alderman v. Eastern R. R. Co.*, 115 Mass. 233, substantially decided that when goods are consigned deliverable to the order of the consignor, and the bill of lading, with a draft for the price, drawn on the purchaser of the goods, attached, is forwarded for collection, the purchaser has no title to the goods until the draft is paid, and the bill of lading is in-



dorsed to him; and the previous sale of the goods to arrive is void as against the person advancing the money to pay the draft, to whom the bill of lading was indorsed by the drawee as soon as he obtained possession; and the second carrier, who received the goods from the first carrier to transport to their destination, with knowledge on whose account they are carried, though without knowledge of the bill of lading, is liable to the holder of the bill of lading if he delivers the goods to such a purchaser. The court of appeals of New York in *Farmers' etc. Nat. Bank v. Logan*, 74 N. Y. 568, substantially announced the same doctrine contained in the last-named case. It is said in 21 <sup>576</sup> *American and English Encyclopedia of Law*, page 507: "The foregoing rules for determining whether the property in goods sold has passed from seller to buyer are rules of construction adopted for the purpose of ascertaining the intention of the parties. It follows necessarily that such general rules are not applicable where exceptional circumstances repel the presumptions or inferences upon which the rules rest. If, notwithstanding the appropriation of the goods, the seller's acts show clearly his purpose to retain the ownership, the property does not pass. It is to be borne in mind, however, that this doctrine applies as between the parties to the sale, and not to the prejudice of the rights of third parties, such as creditors or bona fide purchasers, who, under the circumstances, may be entitled to insist that as to them the reservation should be treated as inoperative. Where the seller delivers goods to the common carrier for delivery to the buyer, this is equivalent to a delivery to the buyer, whose agent the carrier is deemed to be. If a bill of lading is taken, the carrier is bailee for the person indicated by the bill of lading. If, as is frequently the case, the seller has the bill of lading so drawn that the goods are deliverable to his order, this, in the absence of evidence to the contrary, is almost decisive in showing his intention to reserve the *jus disponendi*, and prevent the passing of the title to the buyer. This *prima facie* conclusion that the seller reserves the *jus disponendi* when the bill of lading is to his order may be rebutted by proof that in so doing he acted as agent for the purchaser, and did not intend to retain control of the property; and it is for the jury to determine as a question of fact what the real intention was. So when the seller ships goods to a third person, who is his agent, for delivery to the purchaser, he equally manifests the intention to reserve the <sup>577</sup> *jus disponendi*, and to prevent the property from passing to the purchaser until

such delivery has been made. . . . If the bill of exchange is payable at sight or on demand, there must be both an acceptance and payment before the purchaser can claim the bill of lading." The principle *supra* seems to be sustained, to some extent, at least, by the opinion of this court in *Louisville etc. R. R. Co. v. Hartwell*, 18 Ky. Law Rep. 745, 36 S. W. 183.

We have carefully examined the authorities relied on by the appellee, but are unable to see that they sustain its contention, or are at all in conflict or inconsistent with the doctrine announced in the various decisions hereinbefore referred to. It seems to us that it would be unjust and inexpedient to announce as a principle of law that a consignor consigning property to his own order, with directions to notify the purchaser thereof, and sending a draft, with bill of lading attached, requiring payment of the draft before the bill of lading should be delivered, should be held to have parted with his title to the property. In the case at bar, if it be true that the appellee acquired title to the property before it had paid the draft in question, it would then follow that the property would be liable to its debts, and subject to seizure and sale in satisfaction thereof. It is manifest from the evidence in this case that the Marlin Oil Company never intended to part with its title or its *jus disponendi* to the property in question until the purchase price thereof had in fact been paid. The acceptance of the draft in question was not payment thereof, and, besides, it is questionable whether or not the attachment had not been placed in the hands of the officer, and probably levied, before the acceptance of the draft, which acceptance was only by telephone. The appellee <sup>578</sup> did not pay the draft until December 3d, at which time it received the bill of lading, the symbolic delivery of the property. It can hardly be questioned but that the title to the oil remained in the Marlin Oil Company until the acceptance of the draft, and it may well be questioned whether it was not incumbent on the appellee to show that the acceptance of the draft preceded the issual and levy of the attachment, even if it was to be conceded (which it is not) that the acceptance of the draft perfected appellee's title to the property. It seems manifest that the business interests of the country demand that the consignor in a distant part of the country should have the right to ship property to be delivered to the purchaser only upon the condition that the purchaser first actually pays for the same. It is worthy of note in the case at bar, upon the failure of appellant to pay the draft attached to the bill of lading for this identical

car of oil, that the consignor asserted and exercised the right to make such disposition of the property as it saw fit, although the property was in a tank confessedly the property of appellant, and also in its private yard, though still in custody of the common carrier. Taking into consideration all the facts and circumstances proven in this cause, it is clear that the Marlin Oil Company never intended to part with the *jus disponendi* to the oil until it had first received the price demanded therefor. For the reasons indicated, the judgment of the court below is reversed, and cause remanded, with directions to sustain the attachment of the appellant, and to adjudge the property in question subject to the attachment of the appellant and for proceedings consistent herewith.

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**Sale—Passing of Title.**—If the vendor of goods wishes to prevent the title from passing to the vendee or consignee, and delivers them to a carrier, he must, by bill of lading, make the goods deliverable to his own order: *Scharff v. Meyer*, 133 Mo. 428, 54 Am. St. Rep. 672, 34 S. W. 858. If a vendor takes the bill of lading in his own name, this is strong proof that he intends to reserve title in himself, and is almost decisive of his intention to retain the *jus disponendi* of the property: *Willman Mercantile Co. v. Fussy*, 15 Mont. 511, 48 Am. St. Rep. 698, 39 Pac. 738. See, further, *Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; note to *McNeal v. Braun*, 26 Am. St. Rep. 452, 453.

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## OLD TIMES DISTILLERY COMPANY v. CASEY.

[104 Ky. 616, 47 S. W. 610.]

**INJUNCTION — TRADEMARK — LACHES — WANT OF EQUITY.**—If a trademark has been used by two concerns for ten years, after which one of them applies for an injunction to contest the right of the other to use it, the application will be denied regardless of the rightful ownership of the trademark, where the plaintiff stood by all that time, knowing that the other concern was expending large sums of money in extending the use of, and demand for, the article on which the trademark was used.

Charles H. Gibson and Gibson & Marshall, for the appellants.

William Lindsay, Newton G. Rogers, and Samuel J. Boldrick, for the appellees.

**617 HAZELRIGG, J.** The right of the appellees to the exclusive use of the words "Kentucky Comfort," as a brand and trademark for their whiskies, is the question presented on this appeal. It appears that on March 26, 1883, the appellees, who



were wholesale whisky dealers at Fort Worth, Texas, procured, through the distillery concern of the Boldrick-Callaghan Company of Calvary, Kentucky, the design and brand in dispute, and the same was on that day branded into fifty barrels of whisky sold to appellees by the distilling company, and which were shipped to Fort Worth, and received by appellees on April 10, 1883. Thereafter appellees pushed this brand of whisky, using as their trademark the words "Kentucky Comfort" in connection with the words "Casey & Swasey, Sole Proprietors." Yearly since then the Kentucky company has continued to furnish appellees with from eight hundred to one thousand barrels of whisky branded as indicated. On the other hand, it appears that the distilling concern of F. G. Paine & Co., of Louisville, Kentucky, the predecessors of the appellant, attempted to adopt the words "Kentucky Comfort" as a trademark for their whiskies as early as the fall of 1882, and in fact sold some whisky under that name. They did not, however, at that date, actually brand the words on any barrels of whisky, or apply them directly in any form to their goods. One of the members of the firm did apply to one Jones, a designer of brands, and agreed to take the design and brand in question, but the time when he was to have the branding iron actually made was left open, and as to this time there seems to be some dispute. At any rate, after selling some whiskies under that name, this firm did apply to Jones, about the 1st of April, 1883, for the iron, expecting to get the brand they had contracted <sup>618</sup> for some months before. They learned that a few days before that Jones had let the Boldrick-Callaghan Company have the brand, but, upon insisting that they were entitled to it by prior contract, Jones agreed to see the other company to know what he should do. He says he got permission from a member of the Callaghan Company to make the branding iron for Paine & Co., and did so. Paine & Co. also at once gave notice to the Boldrick-Callaghan Company that they claimed the name, and warned them against its use. The brand so made was actually put on the barrels of F. G. Paine & Co., on the 10th of April, 1883, which appears to be the same day that appellees received their goods at Fort Worth, and first offered them to the public under the brand and trade name of "Kentucky Comfort, Casey & Swasey, Sole Proprietors." Since that date F. G. Paine & Co. and their successor, the appellant, have built up a large demand for this brand of whisky all over the country. Indeed, it is shown that their use of it has been four or five times as great as that of the

appellees. In all the trade journals of the country the whisky branded by appellant as "Kentucky Comfort" has been advertised, and the value of the brand has come in great part from the moneys expended by appellant in such advertisements. Their sales of this brand amount to from three to five thousand barrels per year.

There are many interesting details connected with the original selection of these words and the obtention of the brand, and its application to the goods of the appellees and appellant, to which we have not adverted. These facts would have been important ten years ago, in a contest between these parties for this trademark. The undisputed facts are, however, that, with the knowledge of both sides to this controversy, there have been two brands <sup>619</sup> of "Kentucky Comfort" whisky on the market since 1883, and neither party has seen fit to take steps against the other to try the question of title thereto. The chancellor found the appellees had first actually applied the words to their goods. We think this is, at least, a very doubtful question. Certainly, the first sale and delivery of the goods so branded was the sale and delivery of the goods of appellant shown to have been on April 10th; and it was on this day appellees received their whisky so branded for them at Fort Worth, and on that day presumably offered it for sale. It may be that the application of the brand to the goods at the distillery in Kentucky was sufficient to constitute a prior appropriation of the words, but if this is true, the difference in time between the dates of actual application of the words by the two claimants was only a few days; and, however important this might have been in a contest then inaugurated, it ought not to affect the question now. Each party was clearly acting in good faith in the selection of the words, and there was no intention on the part of either to wrongfully appropriate the invention or the property of the other. As a matter of fact, the parties for ten years have acted on the theory that their geographical position made it unimportant to put to the test the question who was technically entitled to this trademark. The appellees have stood still too many years, with knowledge of the fact that appellant has been expending large sums of money in extending the use of and demand for this brand of whisky, and ought not to be permitted now to reap the benefit of the appellant's industry and enterprise. This is not a case where one who is clearly the owner of a trademark is seeking to withdraw his permission for its further piratical use. In Prince's Metallic

Paint Co. v. Prince Mfg. Co., 57 Fed. <sup>620</sup> 938, it is said: "Now, it is true that where the plaintiff's title to a trademark is clear, mere delay, unaccompanied by anything else, will not ordinarily bar a suit for injunction against a naked infringer: Fullwood v. Fullwood, 9 Ch. Div. 176, 47 L. J. Ch. 459; McLean v. Fleming, 96 U. S. 245; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. Rep. 143. But we are dealing with no such case. In courts of equity the rule is to withhold relief where there has been unreasonable delay in prosecuting a claim, or long acquiescence in the assertion of adverse rights: Creath v. Sims, 5 How. 192; Godden v. Kimmell, 99 U. S. 201; Lansdale v. Smith, 106 U. S. 391, 1 Sup. Ct. Rep. 350. Again and again it has been judicially declared that nothing can call into activity a court of equity but conscience, good faith and reasonable diligence: McKnight v. Taylor, 1 How. 161; Sullivan v. Portland etc. R. R. Co., 94 U. S. 806-812. In McLaughlin v. People's Ry. Co., 21 Fed. 574, Judge Brewer held a bill for the infringement of a patent alleging the unauthorized use and construction of a patented invention for thirteen years, without stating an excuse for the plaintiff's delay in suing, to be demurrable. Laches for even less than the statutory period of limitations, aided by other circumstances, will bar a right: Ashhurst's Appeal, 60 Pa. St. 290, per Strong, J. In Lewis v. Chapman, 3 Beav. 133, the master of the rolls refused an injunction to restrain the infringement of a copyright on the ground of six and one-half years' delay, where there was knowledge of the commencement and prosecution of the defendant's publication. Long acquiescence before filing a bill for an injunction, with full knowledge of the infringement, is deemed laches equivalent to a breach of good faith: Browne on Trademarks, section 497. Hence in Amoskeag Mfg. Co. v. Garner, 55 Barb. 151, a delay of nine years in applying for an injunction to <sup>621</sup> restrain infringement of a trademark was held to be good cause for refusing it." We have quoted at length from this case, because it evidences a full investigation of the authorities, and announces what we conceive to be a sound rule of law, and one quite applicable to the case at hand, viewed from appellee's standpoint. That case was one where the plaintiff had a clear title to the trademark, but the defendant had, for more than eight years, been using it "under a known assertion of right, and at least color of title," and had, by constant and successful advertisement, extended the market for the article, and largely enhanced its reputation; and the court held



that "to take from the defendant the trade advantages thence ensuing, and give them to the plaintiff—the certain effect of an injunction—would be unconscionable"; and we so think here.

The judgment is reversed, with directions to dismiss the petition.

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**Trademark—Injunction.**—Unreasonable delay in bringing suit is always a serious objection to relief in equity, but cases may arise where the complainant may be entitled to an injunction to restrain the future use of a trademark, even when it becomes the duty of the court to deny the prayer of the bill for an account of past profits: Note to *Popham v. Cole*, 23 Am. Rep. 27. In *Bowman v. Floyd*, 3 Allen, 76, 80 Am. Dec. 55, it is held that an injunction will be granted, without regard to lapse of time, to restrain the use of another's name in the designation of a partnership, without the consent of the person if he is living or of his legal representatives if he is dead.

**CASES**  
**IN THE**  
**COURT OF APPEALS**  
**OF**  
**MARYLAND.**

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**SKINNER & SONS SHIPBUILDING AND DRYDOCK  
COMPANY v. HOUGHTON.**

[92 Md. 68, 48 Atl. 85.]

**INSURANCE—VENDOR AND VENDEE.**—If insured property is destroyed after the making of a contract of sale, but before the payment of the purchase money and the execution of the conveyance, the proceeds of the insurance belong to the vendor as between him and the company; but he acts as trustee for the vendee, who, upon payment of the purchase price, is entitled to the insurance money in equity, although he intended to tear the buildings down.

**INSURANCE—CHANGE IN INTEREST.**—By a contract for the sale of insured property, the policy is avoided when it provides that it shall be void if any change, other than by death, takes place in the interest, title, or possession of the subject of the insurance.

W. R. Marbury and G. W. Williams, for the appellant.

M. A. Mullin, W. W. Parker, F. Gosnell, E. A. Poe, and J. P. Poe, for the appellees.

**82 BOYD, J.** On the eighteenth day of February, 1899, Caroline S. Houghton and her husband entered into an agreement with Charles E. Savage, by which they agreed to sell and convey to him or his assigns, upon written notice of the acceptance of the agreement within sixty days from this date, certain property in the city of Baltimore for the sum of fifty thousand dollars. It was agreed that the purchaser should pay the purchase money within ninety days after the notification of the acceptance, and two hundred dollars, paid when the agreement was made, was to be credited on the amount. Within the sixty days (on April 14th), Savage assigned his option to the appel-

lant and notified Mr. and Mrs. Houghton of his acceptance and assignment, to which they gave their assent. On the eleventh day of May, 1899, <sup>83</sup> some of the improvements on the property were destroyed by fire, having been insured in eight companies prior to the execution of the agreement. At the time of the fire the Houghtons were still in possession of the property, none of the purchase money, except the two hundred dollars, had been paid, and the deed had not been executed, but on the 27th of June, 1899, the balance was paid and a deed was executed and delivered. At that time the Houghtons and the appellant entered into an agreement that the payment of the purchase money and acceptance of the deed should not waive any right appellant might have to any moneys to be thereafter collected from insurance companies under the policies covering the property destroyed.

Proofs of loss were duly furnished by Mrs. Houghton, and the eight companies were about to pay her the amounts ascertained to be due by them respectively, when the appellant notified them of its claim to the amounts due. The Westchester Fire Insurance Company of New York paid the amount due by it to Mrs. Houghton. The Norwich Union Fire Insurance Society of England, the Howard Fire Insurance Company of Baltimore City, the Commerce Insurance Company of Albany, New York, the Royal Exchange Assurance of London, and the Pacific Fire Insurance Company of New York City, filed bills of interpleader, offering to pay the amounts due by them to the party entitled thereto, and the German American Insurance Company of New York, and the Merchants and Manufacturers' Fire Insurance Company of Baltimore City denied all liability for reasons, some of which will hereafter be stated. The appellant filed a bill in equity against the Houghtons and the several insurance companies, praying that the companies be enjoined from paying the amounts to Mrs. Houghton, and that she be enjoined from collecting them; that Mrs. Houghton and the Westchester company be required to account for the amount paid by that company to her; that the companies discover and set forth in detail all sums of money due under said policies issued by them; that the said companies be required to pay to the plaintiff the amounts due by <sup>84</sup> them; that Mrs. Houghton be required to bring into court the policies to be delivered to the companies upon payment of the money to the plaintiff and for further relief. The Houghtons demurred to the bill, and the demurrer having been overruled, answered, claiming the



money was due Mrs. Houghton. The Westchester company admitted payment to Mrs. Houghton, and denied any liability to the plaintiff; the five companies mentioned above alleged that they had filed bills of interpleader which were still pending, and the other two denied any liability. The Palatine Insurance Company, Limited, of Manchester, England, filed a petition asking to be made a party, as it had assumed the obligations and liabilities incident to and growing out of certain policies issued by the Merchants and Manufacturers' Insurance Company of Baltimore, and it was so ordered. Testimony was taken, and after hearing the bill of complaint was dismissed, the learned judge who heard the case being of the opinion that the plaintiff had no claim to the funds arising from the policies of insurance.

The facts we have stated, and others that will be hereafter referred to present several questions for our consideration. The points raised by the demurrer to the bill filed by the Houghtons were not pressed in this court, and we understand it to be the desire of all parties to have their rights determined in this cause. We are not informed by the record of the condition of the cases in which bills of interpleader have been filed, but as those companies could, if they saw proper, waive such defenses as the two contending companies have interposed, and pay the proportion of the insurance claimed from them to the vendor or vendee, as may be determined, and as we understand that to be the position taken by them, we will first consider the questions between the appellant and Mrs. Houghton.

1. Leaving out of view, for the present, the effect of the testimony in relation to the interviews of the president of the appellant company and Ira Houghton, the first inquiry to be made is: As between the appellant and Mrs. Houghton, who is entitled to such of the proceeds of the insurance policies as <sup>85</sup> has been or will be collected? There is nothing in the record to suggest that the property enhanced in value between February 18, 1899, the date of the agreement, and May 11th, 1899, the time of the fire. Nor is there anything from which we can infer that the price named in the agreement was not the full value of the property sold. Therefore, no equities of that character are suggested, even if they could be considered. As the purchase money was paid in full, it is manifest that any amount Mrs. Houghton might receive from the insurance companies would be that much more than, by the terms of the agreement, she could have expected to get out of the prop-

erty. On the 14th of April the total moneyed interest she had in the property was fifty thousand dollars, less the two hundred dollars already paid, as by her agreement she had parted with all interest she had in it on payment of that sum. It is true she had an insurable interest in the property until the purchase money was paid, but that was all she had in equity, and as this is a case in equity we must determine it from that standpoint, and it is unnecessary to discuss the rights of the parties as viewed by courts of law. When she took out the policies she was the sole owner of the property, but when the option was accepted her estate was divided into a legal and an equitable one. From that time she held the title as trustee for the appellant, under an obligation to convey it to it, upon payment of the purchase money. Under a contract of this kind, in equity, "the vendee is in fact considered as the owner of the land, and although the vendor may still retain the title, he holds it as a trustee for the vendee, to whom all the beneficial interest has passed, with a lien on the estate as security for any unpaid portion of the purchase money": *McRae v. McRae*, 78 Md. 283, 27 Atl. 1038. Or, as was said in *Worthington v. Lee*, 61 Md. 535: "While at law contracts and covenants to sell, lease, or convey land are considered simply as personal and executory contracts, and covenants without reference to any trust or charge thereby created, yet, in the contemplation of a court of equity, from the time of the contract or covenant, the vendor or lessor, and his heirs, or assigns, <sup>86</sup> except where the latter may be protected for want of notice, are regarded as trustees for the vendee or lessee, and those who may represent him." In *Phelps' Juridical Equity*, section 207, the learned author announces the same rule with clearness, referring to *McRae v. McRae*, 78 Md. 283, 27 Atl. 1038, and other authorities.

After a contract of sale is made, the vendor's interest is not<sup>o</sup> real estate, and in case of his death the unpaid purchase money is personal property and goes to his personal representatives *Hall v. Jones*, 21 Md. 439; *McRae v. McRae*, 78 Md. 283, 27 Atl. 1038. A judgment obtained by a third person against the vendor between the time of the making of the contract and the payment of the purchase money does not defeat or impair the equitable interest thus acquired by the vendee, nor is it a lien on land to affect the rights of such cestui que trust: *Hampson v. Edelen*, 2 Har. & J. 64, 3 Am. Dec. 530; *Valentine v. Seiss*, 79 Md. 190, 28 Atl. 892. When, therefore, the purchase money is paid to the vendor and all his interest in the property

insured is extinguished, upon what principle should he be entitled to recover for himself any additional sum paid by reason of the destruction of the property which he had already been paid for? It would not only be contrary to the well-established principle of the law which prohibits a trustee from using the trust property for his personal gain, but it would be contrary to public policy to subject a vendor, remaining in possession, to the temptation of either destroying the property by fire, or of being guilty of such gross negligence concerning it as might produce that result. It is true that a policy of insurance against loss by fire is only a personal contract of indemnity, but that indemnity is "against a possible loss on account of the interest of the insured in the thing mentioned in the policy" (*Heller v. Marine Bank*, 89 Md. 621, 43 Atl. 800), and when that interest no longer exists the indemnity is likewise at an end, so far as he is concerned. When the purchase money is paid, the vendor can sustain no loss by reason of the destruction of the property by fire, but that is not so with the vendee. This court held in *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582, that in case of loss by fire between the time of the contract of sale and the payment of the purchase money, <sup>87</sup> the vendee must bear the loss, and in that case the contract of purchase was enforced at the instance of the vendor by a court of equity.

Without reference to the authorities it would seem to be manifestly just and equitable that when a court of equity is called upon to determine to which of the two parties a fund is to be paid, resulting from the destruction of a property in which both were interested, but the one has received payment from the other of all the interest she had, while the other is to be the sufferer by reason of the destruction of the property, that it should be awarded to the latter. If that be not so, the one would receive more than the contract contemplated, while the other would receive less. For example, if the value of the property, worth, at the time of the sale, fifty thousand dollars, has been lessened by the fire to the extent of fifteen thousand dollars, the vendor would get sixty-five thousand dollars, and the vendee would get a property worth only thirty-five thousand dollars—the one thus getting thirty per cent more and the other thirty per cent less than they originally contracted for, under Mrs. Houghton's contention.

Such results would not only encourage carelessness in the use of property by vendors, but would materially increase the danger of incendiarism. The policy in the record, which we



understand to be a copy of the others and is what is called a "standard policy," gives the insurance company the option of repairing, replacing, or rebuilding the property destroyed instead of paying the money. If that was done then the purchaser, and not the vendor, would necessarily get the benefit of it, and while it is correct to say that a fire insurance policy is a personal contract of indemnity, the subject matter of the insurance is the property, and the indemnity is against loss by fire as to that and nothing else. When the insurance was taken, Mrs. Houghton owned the property, and the policies were never changed so as to only insure the debt she had against the property, and as the indebtedness to her is extinguished and all her personal interest in the property is gone, she must hold any money she has received, or may yet receive, ~~as~~ in the only other way she could hold it—namely, as trustee for the vendee. It must be remembered we are not now considering the question between her and the insurer, but between her and the owner of the property insured. As she no longer had any interest of her own in that property for which she can receive indemnity, it must be assumed that she took it for her *cestui que trust*.

But we are not without authorities on the identical question. In *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582, this court said, on page 313, in speaking of a policy the vendor had permitted to lapse after the sale but before the fire: "If the policy had existed at the time of the loss, the vendor could have recovered from the insurance company, but being trustee of the premises for the vendee, he would be bound in equity to account to the latter for the money so received." That cannot properly be said to be an obiter dictum, for it was said in considering the effect of the failure of the vendor to continue in force a policy on the property, on his right to specific performance of the contract. Even if it could not be regarded as the judgment of the whole court, it would be entitled to great consideration as the opinion of the learned jurist who delivered it, but he was not announcing a principle that others have refused to adopt or follow. In *Joyce on Insurance*, section 3525, it is said: "If property is destroyed between the time of effecting the contract for the sale and delivery of the deed, the proceeds of an insurance policy upon such property belongs to the vendor as between him and the company, but the former is held to act as trustee for the vendee and must therefore account to his *cestui que trust* in equity." To the same effect are the cases of *In-*

insurance Co. v. Updegraff, 21 Pa. St. 513; Reed v. Lukens, 44 Pa. St. 200, 84 Am. Dec. 425; Hill v. Cumberland etc. Ins. Co., 59 Pa. St. 474; Purcell v. Grosser, 109 Pa. St. 617; Gilbert v. Port, 28 Ohio St. 276; Williams v. Lilly, 67 Conn. 50, 34 Atl. 765.

In Rayner v. Preston, L. R. 18 Ch. D. 1, a contrary view was adopted by two out of the three lords justices who sat. One of them expressly repudiated the doctrine that a vendor was, under such circumstances as we have referred to, a trustee <sup>89</sup> for the vendee, and the other admitted that he was in a qualified sense, but said that he could not be trustee of the money recovered. Lord Justice James recorded his dissent in a vigorous and convincing opinion which, as to the relation of the parties being that of trustee and cestui que trust, is in accord with our own decisions as well as the great weight of authority in this country. The case of Carpenter v. Providence etc. Ins. Co., 16 Pet. 496, relied on by the solicitors for Mrs. Houghton, does not militate against the contention of the appellant. There a mortgagee obtained insurance to secure his debt and nothing more. In Callahan v. Linthicum, 43 Md. 97, 20 Am. Rep. 106, this court quoted at length from that decision and adopted the rule therein expressed, but the facts were different in the two cases and hence different results were reached. In Callahan v. Linthicum, 43 Md. 97, 20 Am. Rep. 106, the appellee sold the property to the appellant and took a mortgage to secure the balance of the purchase money. Before the sale the appellee had insured the property, and when he conveyed it to the appellant the insurance was continued under the same policy, in the same manner, and for the same amount as before. This court said: "While it may be conceded that this arrangement could not give to the appellant the right to sue at law upon the policy, for want of legal privity with the contract of insurance, yet, under such circumstances, the mortgagee would be treated in a court of equity as trustee for the mortgagor, and in the event of the payment of the mortgage debt by the latter, he would be entitled to maintain a suit in equity, to recover the money received by the former under the policy of insurance," and cited Insurance Co. v. Updegraff, 21 Pa. St. 513, and Reed v. Lukens, 40 Pa. St. 200, 84 Am. Dec. 425. Nor is the case of Heller v. Marine Bank, 89 Md. 621, 43 Atl. 800, in conflict with the doctrine we have announced. It was said there that "such personal contracts of indemnity do not attach to the realty or in any manner go with the same, as inci-

dent, by any conveyance or assignment, unless there is, in addition, some special stipulation to that effect between the insurer and insured." But the appellant does not claim the proceeds of these policies on the theory that they attached to the realty, and therefore passed <sup>90</sup> to it as purchaser, but it is because Mrs. Houghton, by the contract of sale, became the trustee of the property for the appellant, and, although the contract of indemnity was continued with her, it was for the benefit of her cestui que trust, as well as for herself. When all she was entitled to was paid, the proceeds to be derived from the policies, as between the appellant and herself, belonged to the former. If the insurance money had been paid her before the purchase money was paid, she could only have demanded the difference, and when the purchase money was paid it was with the express agreement that it should not prejudice the claim of the appellant to that fund. Without discussing other cases relied on by the counsel for Mrs. Houghton, it is sufficient to say that those which do at all apply to this question are not sufficient to overcome the cases we have cited above and the reasoning contained in them.

2. The next question is, What is the effect of the testimony in reference to the conversations between Mr. Skinner, the president of the appellant, and Mr. Ira Houghton, the agent of his mother, the vendor? The substance of them is that, after the option was accepted, and before the fire, Mr. Houghton asked Mr. Skinner if he would take these policies of insurance, and he replied that he would not, that he intended to tear the buildings down. Mr. Houghton also testified that he said to Mr. Skinner, "We have insurance on that property; shall I figure the adjustment up and the rebates of the premium?" to which he replied: "No; you cancel the insurance because I will not use it"; and then he (Houghton) said: "Well, I will keep it insured for mother's interest until the sale has been consummated," and Mr. Skinner said "that was right." This evidence was admitted subject to exceptions and the judge refused to strike it out. We do not deem it necessary to discuss its admissibility, as under the circumstances we do not think it affects the result between the vendor and purchaser. In answer to the question whether he meant to say that the conversation never occurred, as related by Mr. Houghton, Mr. Skinner said: "I shouldn't like to say that Mr. Houghton <sup>91</sup> was telling what is not so, but I have no recollection of that conversation, and it certainly would be something that would impress itself upon



my mind if it had occurred." Again, he said: "I do not recollect any such conversation having occurred; the only time that insurance was ever mentioned to me, to the best of my knowledge, was on our property at the place." If Mr. Skinner had understood the arrangement as Mr. Houghton did, it would, as he said, certainly have impressed itself upon his mind, yet he swears positively that he has no recollection of such conversation and his testimony amounts to a denial of that of Mr. Houghton—although couched in polite language, it is sufficiently positive.

The policies were not altered and the companies were not notified of any change, but the insurance was continued as formerly. In order to justify the court in reaching the conclusion that it was agreed between Mr. Houghton and Mr. Skinner that the appellant should no longer have any benefit of the insurance, it would require proof of a more convincing character than the above. It is true Mrs. Houghton could have canceled the policies without the consent of the appellant, but it would not only be unreasonable to suppose that she had any idea of doing so before the purchase money was paid, but in point of fact she did not do so. On the day of the fire they embodied the same terms, covered the same property, and in terms insured the same interest as they did the day the option was accepted, and for reasons we have given above, as between the appellant and Mrs. Houghton, the money is justly due the former, who sustained the loss, and not the latter, who has suffered no injury. Mr. Skinner's statement that he did not intend to carry insurance, as he would tear the buildings down, could of course only apply to the time when he got possession of the property, and does not deprive the appellant of its right to the insurance money any more than the expectation of any owner of removing improvements would prevent recovery if a fire occurred before such removal. It might, under some circumstances, reflect upon the value of the property insured, but it would be of no avail, as a bar to the action, <sup>92</sup> for an insurance company, much less for one occupying the position Mrs. Houghton does, to prove that the owner of insured property destroyed by fire had previously announced his intention of tearing it down.

We are, therefore, of the opinion that as between these two parties, the appellant is entitled to any money received from the proceeds of insurance policies on the property. The insurance companies could waive any right they may have to take advantage of any change in the property, contrary to the pro-

visions of the policies or other rights, and in the absence of fraud or other good reason it is commendable when they do not permit innocent parties to suffer loss through a misapprehension of their rights or duties under the terms of the policies. As our understanding is that six of the companies have waived the defenses set up by the others, we have thus considered the rights of the vendor and purchaser to the fund.

3. We now come to the defenses made by the German American Fire Insurance Company of New York, and the Merchants and Manufacturers' Fire Insurance Company of Baltimore. The policies contain, amongst others, the following provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if any change, other than by the death of an assured, takes place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured or otherwise." It is claimed that the contract of sale avoided the policies under that provision. Other defenses were made, but under the view we take of this provision it will be unnecessary to discuss them. We have determined above that the effect of the contract of sale, after the option was accepted, was to vest the beneficial interest in the property in the purchaser. It is true that such effect is only given to a contract of that character in a court of equity, but can we give the appellant the benefit of such equitable doctrine and refuse to grant it to other parties to this cause? The appellant is now asking the aid of a court of equity to <sup>93</sup> enforce what it claims to be its rights, and it would, indeed, present a unique case if we should ascertain the status of the property to give the appellant any standing in court, and then decline to recognize that status in considering the defenses set up by these companies. It must be certain that the appellant can have no remedy against them, unless it is worked out through Mrs. Houghton, and it has no claim against her excepting by the application of the equitable principles we have adopted above. It cannot be permissible for us, in this case, to leave out of consideration the fact, which we have before us, that the appellant at the time of the fire did have the beneficial interest in the property insured, by virtue of the contract of sale (which we have determined at its instance), and we must, therefore, bear in mind that fact when we inquire into the effect of this provision in the policy, to see

whether there was such a change in the interest, title or possession of the subject of insurance as made the policies void.

No precisely similar provision in a policy of insurance has heretofore been before this court. In *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, it did hold that a mere contract for the sale of the insured premises, without delivery or possession, or execution of a deed therefor, with only a part of the purchase money paid, was not a sale within the meaning of the provision that "if the said property shall be sold or conveyed, or if this policy shall be assigned, without the consent of the company obtained in writing hereon, . . . then this policy shall be null and void." But there Judge Miller said: "The provision in this policy is in the simplest and least stringent form prohibiting a sale or conveyance, terms of equivalent import with, and certainly not more comprehensive than, 'alienation by sale or otherwise.'" Judge Alvey dissented in that case, but the majority of the court thought it was not within the terms of the prohibition. But the language used here is much broader than in that case—that which is particularly applicable being "if any change, other than by death of an assured, take place in the interest of the subject of insurance." Can it be doubted that there was a change in the interest in <sup>94</sup> this property? As long as the insured has made no change in his estate in the property, a company may be perfectly satisfied to continue the insurance, but if he makes such a change as to divest himself of all interest in the property, excepting a vendor's lien for the purchase money, and has a responsible party bound for the payment of that, he does not have the same motive for the protection of the property that he had before. In short, the insurer's risk is or may be increased by the change of the interest of the insured. As was said by Judge Alvey, in *Bowman v. Franklin Fire Ins. Co.*, 40 Md. 631: "The great purpose of all such provisions in policies of insurance is to enable the insurer to determine the extent of the risk, and the nature and extent of the interest of the insured in the premises." That expression was used in discussing the effect of a judgment against property when insurance was taken out under a policy that provided that "any encumbrance on the property hereby insured, whether existing at the time of issuing the policy or imposed subsequently thereto, must be assented to by the company; otherwise the policy shall be void." It was held that the policy was void by reason of the judgment lien not being disclosed. In *Westchester Fire Ins. Co. v. Weaver*, 70 Md. 536, 17 Atl. 401,



18 Atl. 1034, the policy was held to be void, because there was a mortgage on the property, there being a proviso that it should be void unless consent in writing was given, "if the assured is not the sole and unconditional owner of the property, . . . or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, is not truly stated in this policy."

The policies before us contain provisions, in addition to what we have already stated, that they should be void "if the interest of the insured in the property be not truly stated therein," and "unless otherwise provided by the agreement and indorsed hereon or added hereto . . . if the interest of the insured be other than unconditional and sole ownership." There is no indorsement to the contrary, and therefore it was represented to the companies that the interest of <sup>95</sup> the insured was "unconditional and sole ownership" when the policies were issued, and under the other provision any change in the interest held when the insurance was taken would invalidate the policy. It would certainly be placing a very liberal construction on these provisions, in favor of the assured, to say that after April 14, 1899, the interest of Mrs. Houghton was still an unconditional and sole ownership. She and her husband were then bound under their hands and seals to give the appellant a good and merchantable fee simple title to the property within ninety days from April 14th. She was not then the sole owner, as the appellant then owned the equitable estate in the property, and any loss by fire would be sustained by it. In equity it was regarded as the owner. There are a number of cases cited in note to 13 Encyclopedia of Law, second edition, 234, deciding that one who is in possession of real property under a contract to purchase, and not in default in the payment, is in equity the owner of the land, and hence is entitled to insure as "sole and unconditional owner," and on page 235 of the same volume it is said: "A vendor in a land contract who has admitted the vendee into possession is not sole and unconditional owner, although he retains the legal title." We do not understand why the possession of the vendee should make any difference in determining whether the vendor is the sole and unconditional owner. If the vendor conveys by deed all his interest and takes a mortgage for the purchase money, but remains in possession, he would not be the sole and unconditional owner. And if he has done an act which vests another with such an estate as to make him sustain the loss, if destroyed or injured by fire, and cause him to be

regarded in equity as the owner, as has been **done** here, how can it be said that the interest of the vendor is still that of unconditional and sole ownership?

The cases referred to under the first branch of this case show that the purchaser is the owner, and there are many decisions to the effect that he is within the meaning of such provisions in policies the "sole owner." In *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686, 12 Atl. 668, the principle is well stated and <sup>96</sup> many authorities are cited. In *Clay Fire etc. Ins. Co. v. Huron-Salt etc. Co.*, 31 Mich. 346, it is said: "Certainly, it cannot be claimed that a party holds by a sole, unconditional, and entire ownership and title, when in truth another at the same time has so complete a right and interest that he may be rightly considered as owner"; and it was there determined that the vendor was not such owner because he had made a contract of sale for the property under such circumstances as to make the purchaser the owner. If there had been such a provision in the policy before the court in *Callahan v. Linthicum*, 43 Md. 97, 20 Am. Rep. 106, a different result would doubtless have been reached in that case.

In *Gibb v. Philadelphia Fire Ins. Co.*, 59 Minn. 267, 50 Am. St. Rep. 405, 61 N. W. 137, the provision in the policy as to change of interest was the same as in those before us, and the court held that the plaintiff could not recover. It was there said that the great weight of authority held that when the condition is against any change in the title, there is no breach unless there is a change in the legal title, but, it was added, "the word 'interest' is broader than the word 'title,' and includes both legal and equitable rights": See, also, *Germond v. Home Ins. Co.*, 2 Hun, 540; *Arkansas Fire Ins. Co. v. Wilson*, 67 Ark. 553, 55 S. W. 935; 13 Ency. of Law, 2d ed., 239, etc. In the *Encyclopedia of Law* the development of the clause against alienation is discussed and many authorities cited. When we remember the manifest object of such provisions and the explicit language used in these policies, we cannot escape the conclusion that a sale, such as was made by Mrs. Houghton, did render the policies void. It may be that great hardship is sometimes imposed on innocent persons, by reason of such provisions in insurance policies, but that does not justify courts in refusing to enforce contracts, as made by the parties, if lawful. When the provisions are reasonable and tend to prevent incendiarism or carelessness, which may inflict losses upon other persons whose properties are in the vicinity, their language should at least be given its

usual and ordinary meaning. When a sale of property <sup>97</sup> is thus made, it is a simple matter to obtain the consent of the insurer, if his risk is not materially increased, and if it is so increased why should he be subjected to a hazard that he has not assumed? Until the offer of the Houghtons had been accepted, a different condition existed, but after it was, there was then a binding agreement on the one part to sell and on the other to purchase, and there was hence a change of interest in the subject of insurance. It is not necessary for us to determine in this case whether a judgment obtained in invitum or the mere filing of a mechanic's or other lien would work a forfeiture. Such questions are not before us.

4. There can be no recovery against the Westchester Fire Insurance Company of New York by the appellant. Under its own theory Mrs. Houghton had the power, as trustee, to collect the insurance money, and hence that company cannot be held responsible for paying it over to her.

The decree will be affirmed, in so far as it dismisses the bill against the Westchester Fire Insurance Company of New York, the German Fire Insurance Company of New York, the Merchants and Manufacturers' Fire Insurance Company of Baltimore City, and the Palatine Insurance Company, Limited, of Manchester, England, but it will be reversed in so far as it is dismissed as against Mr. and Mrs. Houghton. As the other five insurance companies have come into court and offered to pay the proper party, the bill will be retained as to them. The amounts due can be ascertained and the court below can then pass a decree against the Houghtons, requiring them to pay over what the Westchester company has paid and the amounts received of the five companies if paid to them. That can be paid into the court below by the companies in this case, if they so desire, as all persons interested are parties to it, and have requested the court to dispose of all the questions.

It is but proper that Mrs. Houghton should be allowed all costs and expenses incurred by her in securing any of the fund she has received, or will receive, on account of the insurance, and that the costs be paid out of the funds in her hands. This <sup>98</sup> may include reasonable commissions on the amount she receives, if the court below is of the opinion she is entitled to them under the facts that may be presented to it, or are within its knowledge. There is not sufficient in the record to enable us to determine that.



Decree affirmed in part and reversed in part and cause remanded, Caroline S. Houghton to pay the costs out of the insurance funds in her hands.

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**Fire Insurance—Change of Interest.**—Under the conditions of an insurance policy that it shall become void if the interest of the insured becomes other than the entire, unconditional, unencumbered, and sole ownership, the policy is not avoided because the insured entered into an executory contract in writing to sell, where no deed passes and no possession is given: *Arkansas Fire Ins. Co. v. Wilson*, 67 Ark. 553, 77 Am. St. Rep. 129, 55 S. W. 933. But see *Gibb v. Philadelphia etc. Ins. Co.*, 59 Minn. 267, 50 Am. St. Rep. 405, 61 N. W. 137. A transfer by the insured of less than his entire interest in the property does not defeat the policy: *Clinton v. Norfolk Mut. Fire Ins. Co.*, 176 Mass. 486, 79 Am. St. Rep. 325, 57 N. E. 998. See, further, the monographic note to *Morrison v. Insurance Co.*, 59 Am. Dec. 304-312.

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## WEBB v. WEBB.

[92 Md. 101, 48 Atl. 95.]

**WILLS—VESTED LEGACIES.**—Legacies “to be given to my grandsons, or to the survivor or survivors of them, at such times as my executors may find convenient and in accordance with their best judgment, but in no case before they or either of them shall have reached the age of twenty-one years,” are vested. The direction as to time of payment relates to the enjoyment and not to the time of vesting.

**WILLS—VESTED LEGACIES.**—Any bequest to a person in esse, unless there is some clearly expressed desire or manifest reason for suspending or deferring the time of vesting, confers an immediate vested interest, although the time of enjoyment may be postponed.

**WILLS—LEGACIES—INTEREST.**—If the testator stands in loco parentis to the legatee, and the latter is otherwise unprovided for, interest is allowed upon the legacy from the death of the testator, although a future time is fixed for its payment.

**WILLS—LEGACIES—EVIDENCE OF INTENTION** on the part of a testator to stand in loco parentis to his legatee may be found upon the face of the will, from the nature of its provisions, or in the conduct of the testator, and in the circumstances surrounding them and the beneficiary.

**WILLS—LEGACIES—INTEREST.**—If a testator places himself in loco parentis to his legatee by paying a sum weekly or otherwise for his support, who is otherwise without support, interest is payable upon his death on the legacy, although it is made payable to the legatee upon his attaining a specified age.

**WILLS — CONTINGENT LEGACIES—INTEREST.**—A bequest of legacies to beneficiaries named, “who may live to reach the age of twenty-one years,” creates contingent legacies, which do not begin to draw interest until the happening of the condition upon which they are predicated.

C. C. and F. V. Rhodes, for the appellant.

F. Gosnell and J. W. McElroy, for the appellee.

**106** SCHMUCKER, J. This is an appeal from an order allowing a counsel fee out of the income from certain legacies held by the appellants in trust for the infant appellees. The reasonableness of the amount of the fee is admitted, but the appellants deny that they have any funds out of which to pay it, and thus raise for determination the main issue in the case, which is: From what time do the legacies bear interest?

William P. Webb, the grandfather of the infant appellees, who are the children of his deceased son, George P. Webb, in his will gave to his two sons, William R. and Armstead M., all of his estate of every kind other than that described in the following clause, i. e., "excepting only the ten shares of the stock of the Lorraine Cemetery Company of Baltimore City, and the ten lots in the said cemetery, which were formerly the **107** property of my deceased son, George Prescott Webb, and which became mine upon the death of my sister, Eliza Ann Webb, to whom they had been transferred, to my grandsons, or the survivors or survivor of them, the sons of my deceased son, George Prescott Webb, to whom, or to the survivors or survivor of them. I also desire my executors hereinafter named to give at such time or times as they may find convenient and—accordance with their best judgment not earlier, however, than they or either of them shall reach the age of twenty-one years, the sum of ten thousand dollars each." The two living sons, William R. and Armstead M., who are the appellants, were named as executors in the will.

The testator, by a codicil to his will, provided as follows: "Whereas, in said will, in the clauses succeeding the one beginning 'and excepting only, etc.,' there is an omission that renders said clauses ambiguous, and it is my purpose and intention by this codicil to correct said ambiguity and also to make certain other changes in my will aforesaid:

"Now, therefore, I will and bequeath as follows: That the ten (10) shares of the stock of the Lorraine Cemetery Company of Baltimore City, and the ten (10) lots in the said cemetery, formerly the property of my deceased son, George Prescott Webb, which became mine on the death of my sister, Eliza Ann Webb, to whom they had been transferred, be given to my grandsons (or to the survivors or survivor of them), the sons of my deceased son, George Prescott Webb, at such time

or times as my executors hereinbefore named may find convenient, and in accordance with their best judgment, but in no case before they or either of them shall have reached the age of twenty-one years; to whom (or to the survivors or survivor of them)

"I also desire my executors to give, under the above limitations as to age and time or times, the sum of five thousand dollars (\$5,000) each."

The testator's widow, Anna Eliza Webb, by her will made provision for the appellees as follows: "After the payment of all my just debts and funeral expenses, . . . <sup>108</sup> I give, devise and bequeath to each of my grandsons, the sons of my deceased son, George Prescott Webb, who may live to reach the age of twenty-one years, the sum of one thousand dollars; I give, devise, grant, and bequeath all the residue of my estate, real, personal, and mixed, of every description and wherever situated, to my two sons, the Reverend William Rollins Webb and Armstead Moore Webb, or the survivor of them, absolutely." She also made the appellants her executors.

William P. Webb died on December 23, 1895, and his wife died on November 22, 1898. The wills of both were admitted to probate and the appellants qualified as executors of each will.

The equitable appellees were infants of tender years at the death of their father, George Prescott Webb, who left them entirely without means of support. They were taken to the residence of their aunt, the legal appellee, who is a seamstress, depending upon her own labor for her maintenance. The grandfather, William P. Webb, paid to the aunt the weekly sum of five dollars as long as he lived for the board, or toward the support, of the infant orphans. After his death his wife continued to make the same weekly payment until she died, and after that the appellants made the weekly payment for account of the legacies until the institution of this suit.

The bill of complaint was filed by the appellees, who are still infants, by their aunt, who had been appointed their guardian, setting forth the facts already stated, and averring that the appellants had ample assets to pay the legacies of both wills in full. It prayed that the legacies under each will to the appellees might be treated as trust funds in the hands of the appellants, and that the court would assume jurisdiction of the trusts and supervise their administration for the support and education of the appellees, and for general relief.



The appellants did not assume a hostile attitude to the proceeding nor object to the joinder of the two trusts in one case, which had been made for the purpose of economy. They answered the bill admitting most of its allegations of fact, including <sup>109</sup> the possession by them of assets sufficient to pay the legacies, and expressing their willingness to pass over the amount of the legacies from themselves as executors to themselves as testamentary trustees, and to give bond for the faithful performance of the trusts of the two wills pertaining to the respective legacies. They, however, in their answer contended that the appellees were not entitled to any interest on their legacies until after they reached twenty-one years of age, and that in case of the death of either of them before arriving at that age, his legacy would lapse into the estate of the testator.

After testimony had been taken establishing the facts of the case, an order of court was passed by consent on June 23, 1899, describing the appellants as trustees, having in charge the legacies devised to the infant appellees and directing them to pay to the guardian of the appellees the monthly sum of thirty-two dollars and fifty cents, until the further order of the court in the premises, and providing that such payments, as well as the like payments theretofore made, "be a charge and credit upon the respective legacies." The appellants then filed a duly approved bond for the faithful discharge of the trust reposed in them respecting the legacies to the appellees under the wills of their grandfather and grandmother, or by the order already passed, or such orders or decrees as might be thereafter passed in the case. The court did not by its order formally assume jurisdiction of the trusts of the wills in respect to the legacies to the appellees, or direct them to be thereafter executed under its supervision, but that was the practical result of the order, as it gave directions in reference to the performance of the trusts, and declared that the order should be operative only until the further order of the court, thus plainly indicating a purpose to retain the bill for further action thereon. The appellants were not designated trustees in either of the wills, but the duties imposed upon them in reference to the custody of the legacies for an indefinite period were more appropriate to the office of trustee than that of executor, and they by their answer filed in this case, expressed their willingness to turn <sup>110</sup> over the legacies from themselves as executors to themselves as trustees, and give bond in the latter capacity, which they have since done, and the order of court of June 23, 1899, passed with

their assent, treated and described them as trustees. They cannot now retrace their steps and elect to act as executors: *State v. Cheston*, 51 Md. 352.

About three months after the date of the order last referred to, the appellees filed a petition in the case asking for an accounting under the court's direction of the moneys paid to them or for their account or benefit by the appellants since the death of the testator and testatrix. Upon this petition an order was passed referring the case to the auditor to state an account. After the case went to the auditor the counsel for the appellees filed a petition asking to be allowed a counsel fee for their professional services in the case. Annexed to this petition was the certificate of several reputable members of the bar suggesting two hundred and fifty dollars as a fair and reasonable fee. An *ex parte* order was passed by the court, allowing the fee as prayed. The appellants then filed two successive petitions in which they prayed that the order referring the case to the auditor to state an account, and also the order allowing the counsel fee, might be vacated, because the order of June 23, 1899, was an adjudication of the matters at issue between the parties, and that the petitioners had no estate in their hands that was being administered under the direction of the court, and that therefore the court had no jurisdiction to pass the orders.

The parties were then heard in argument by the court, which passed the order appealed from, determining that the legacies to the appellees were in the hands of the appellants as trustees, and that the petitioning counsel were entitled to compensation for their professional services and fixing the fee at two hundred and fifty dollars, the reasonableness of that amount not being objected to by counsel for the trustees, and directing it to be paid out of the income of the trust estate.

The order appealed from did not in terms pass upon the position asserted by the appellants, that the order of June 23, 1899, was a final adjudication of the matters at issue between the parties, but it is evident from the face of the order of June 23d that it was not intended to be final, as it was by its own terms to be operative only until the further order of the court. The case is still open for the determination of the issues raised by the bill of complaint, which contained a distinct prayer that the court would assume jurisdiction over the legacies as a trust fund and supervise and direct the administration of the trust. All questions arising incidentally to such administration may be heard and determined in this proceeding.

We think that the devise and legacies given to the equitable appellees by the will of their grandfather were vested, and that the direction as to the time of their payment related to the enjoyment and not to the vesting. This court has in a long line of decisions announced and reiterated the doctrine that the law favors the early vesting of estates. Even in the case of devises and legacies in remainder, of which the devisee or legatee does not come into possession until after the expiration of a life estate, it has uniformly been held that the postponement of the time of enjoyment will not defer the vesting of the gift, which will be held to be vested whenever it can fairly be done without doing violence to the language of the will: *Spence v. Robins*, 6 Gill & J. 507, 26 Am. Dec. 587; *Lark v. Linstead*, 2 Md. 420; *Tayloe v. Mosher*, 29 Md. 443; *Fairfax v. Brown*, 60 Md. 50; *Crisp v. Crisp*, 61 Md. 149; *Von der Horst v. Von der Horst*, 88 Md. 129, 130, 41 Atl. 124. "The general rule is, that any devise or bequest to a person or persons in esse, unless there be some clearly expressed desire or manifest reason for suspending or deferring the time of vesting, confers an immediately vested interest, although the time of enjoyment may be postponed": *Dulaney v. Middleton*, 72 Md. 75, 19 Atl. 149.

In the case before us, the devise and legacy are made directly to persons in esse named in the will, without the intervention of any intermediate estate. It is true the executors are directed to pay over the legacies at such times as they may find convenient and in accordance with their best judgment, and not <sup>112</sup> before the legatees shall have reached the age of twenty-one years but these directions relate merely to the time of enjoyment and are not of the substance of the gift. The expression, "the survivors or survivor of them," used in connection with the gift to the grandchildren, is, in our judgment, to be referred to the date of the death of the testator, as their presence in the will in the connection in which they are used does not manifest anything like a clear intention on the part of the testator to postpone the time of vesting of his gifts to his grandchildren.

Ordinarily, a legacy bears interest only from the time at which it is by the terms of the will made payable, but it is well settled that where the testator stands in loco parentis to the legatee, and the latter is otherwise unprovided for, interest will be allowed upon the legacy from the death of the testator, notwithstanding the fact that a future time is fixed for its pay-



ment: *Budd v. Garrison*, 45 Md. 420; *Von der Horst v. Von der Horst*, 88 Md. 129, 41 Atl. 124.

One who stands in *loco parentis* is defined by this court in *Von der Horst's* case as a person, "who means to put himself in the situation of the lawful father of the child with reference to the father's office and duty of making provision for the child." Evidence of the intention on the part of a testator to stand in this relation to his legatee may be found upon the face of the will, from the nature of its provisions, or in the conduct of the testator and in the circumstances surrounding him and the beneficiary: *Von der Horst v. Von der Horst*, 88 Md. 129, 41 Atl. 124, and cases there cited.

In *Rogers v. Soutten*, 2 Keen, 598, a testator in his lifetime voluntarily became bound to the parish for the support of an illegitimate child of his son and made weekly payments of three shillings for that purpose, with a few exceptions, as long as he lived. It was held by Langdale, master of the rolls, that the testator had placed himself in *loco parentis* to his grandchild, and that interest was payable from his death on a legacy given by him to the child, although by the terms of his will the legacy was made payable on the child's attaining twenty-one years of age.

<sup>113</sup> In the present case the legatees had, for some time prior to the testator's death, been infant orphans of tender years, and absolutely without means of support. They were, as we have already said, taken charge of by an aunt, who is a single woman, earning her living by sewing, and the testator paid to her five dollars per week for their board or for the expense of their maintenance. The aunt testified that this weekly sum, together with occasional gifts of clothing and a donation of thirty dollars, constituted the sole income or means of support of the legatees until recently, when some of them have at times been able to earn small wages. The weekly sum paid by the testator for the board or support of his legatees, who were his infant grandchildren, was not a large one, but in view of his blood relation to them and the fact that they were without other support, we are justified in reaching the conclusion from his conduct and the surrounding circumstances that he intended to put himself in *loco parentis* to them. Such being the case, it follows that the appellees are entitled to interest on their pecuniary legacies from the death of the testator, and upon the same ground are entitled to the income, if any, produced since the death by the property specifically bequeathed to them.

The legacies of one thousand dollars each, given to the appellees by the will of their grandmother, are of a different character. They were given "to each of my [her] grandsons, the sons of my deceased son, George Prescott Webb, who may live to reach the age of twenty-one years." These legacies were given upon the plain condition that each legatee must arrive at a given age to entitle him to take at all, and they are, therefore, not vested, but contingent, legacies, and do not begin to bear interest until the title to them vests by the happening of the condition upon which they are predicated.

It follows from what we have said that the order appealed from must be affirmed and the case remanded for the further administration of the trusts of the legacies under the supervision of the circuit court.

Order affirmed and cause remanded.

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**Legacies—When Vested.**—The general rule is, that if futurity is annexed to the substance of a gift, the vesting is suspended; but if the gift is absolute, and the time of payment only is postponed, the gift vests at once: See the extended note to *Goebel v. Wolf*, 10 Am. St. Rep. 471; *Patton v. Ludington*, 103 Wis. 629, 74 Am. St. Rep. 910, 79 N. W. 1073. A gift by will to a person, if or when he shall attain a certain age, does not vest until the age is attained: *Eldred v. Meek*, 183 Ill. 26, 75 Am. St. Rep. 86, 55 N. E. 536.

**Legacies—Interest on.**—Though a will declares that the executor shall not be required to pay certain legacies until such time as it may be practicable to do so, having regard to the beneficial management of the estate, they bear interest commencing one year from the testator's death, if the statute declares that legacies are due and deliverable at the expiration of one year after such decease, and bear interest after they are due and deliverable: *In re Williams*, 112 Cal. 521, 53 Am. St. Rep. 224, 44 Pac. 808.

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## WORTHINGTON v. STATE.

[92 Md. 222, 48 Atl. 355.]

**ABORTION—MANSLAUGHTER.**—Death of a woman caused by an abortion is manslaughter, and not murder.

**ABORTION—MANSLAUGHTER.—INDICTMENT** for manslaughter in causing the death of a woman by means of an abortion is valid.

**EVIDENCE—DYING DECLARATIONS OF WOMAN SUBJECTED TO AN ABORTION.**—Under an indictment charging manslaughter in causing the death of a woman by means of an abortion, evidence of the dying declarations of the woman is admissible in evidence, since the indictment charges a homicide.

**EVIDENCE.—DYING DECLARATIONS** are admissible in evidence when the declarant constantly believes that death is approaching, although the attending physician holds out hope of recovery.

**EVIDENCE — DYING DECLARATIONS—IDENTITY OF PARTY NAMED.**—If a woman makes a dying declaration that a certain person, naming him, committed an abortion upon her, the identity of the person named with the accused is a question for the jury.

**EVIDENCE—DYING DECLARATIONS.**—If a person has expressed a continuing belief that he is about to die, declarations made by him on a subsequent day, and while such belief still continues, as to the cause of death are admissible in evidence.

**EVIDENCE—DYING DECLARATIONS.**—A witness attempting to testify to dying declarations made to him need not repeat the exact language of the declarant, but may give his recollection of its substance.

**EVIDENCE.—DYING DECLARATIONS** made in response to questions propounded to the declarant are competent evidence.

The indictment in this case was as follows:

“State of Maryland, city of Baltimore, to wit: The jurors of the state of Maryland, for the body of the city of Baltimore, do on their oath present that George C. Worthington, late of said city, on the eighteenth day of June, in the year of our Lord 1899, with force and arms, at the city aforesaid, in and upon one Amelia A. Miller, feloniously and willfully did make an assault, and did then and there feloniously and willfully force, thrust, and strike a certain instrument, to the jurors aforesaid unknown, which he, the said George C. Worthington, then and there had and held in his right hand, up and into the body and womb of the said Amelia A. Miller, who was then and there pregnant with child, and did then and there feloniously and willfully give and administer to the said Amelia A. Miller, so being pregnant with child as aforesaid, divers dangerous poisons, drugs, mixtures, preparations, medicine, and noxious things, the more particular description of which is to the jurors aforesaid unknown, for the purpose then and there of causing, without legal justification, the miscarriage and abortion of the said Amelia A. Miller, thereby then and there inflicting on the said Amelia A. Miller in and about her womb and other internal parts, certain mortal bruises, wounds, lacerations, sickness, and feebleness of body, of which said mortal bruises, wounds, lacerations, sickness, and feebleness of body, she, the said Amelia A. Miller, afterward, to wit, on the thirtieth day of June, in the said year there died.

“And so the jurors aforesaid, upon their oath aforesaid, do say that he, the said George C. Worthington, her, the said



Amelia A. Miller, in the manner and by means aforesaid feloniously and willfully did kill and slay.

"And that before the commission of the felony aforesaid, Henry G. Allgire, late of said city, on the said eighteenth day of June, in the said year, at the said city, did feloniously and willfully counsel, aid, incite, and procure the said George C. Worthington to commit in manner and form aforesaid, the said felony contrary to the form of the act of assembly in such case made and provided, and against the peace, government, and dignity of the state.

HENRY DUFFY,

"State's Attorney for the City of Baltimore."

The above indictment duly indorsed: "True Bill.

"E. H. WALKER,

"Assistant Foreman."

W. P. White, for the appellant.

I. Raynor, attorney general, and R. M. McLane, state's attorney, for the appellee.

235 PEARCE, J. The defendant was indicted in the criminal court of Baltimore for manslaughter, in causing the death of Amelia A. Miller, through an abortion performed on her by him. He demurred to the indictment, and the demurrer being overruled, he was convicted and was sentenced to the penitentiary for ten years. Nine bills of exception were taken to the admissibility of evidence, and the questions thus presented, together with the demurrer, are now before us for determination. As the demurrer raises a question of novelty and of some importance in criminal pleading and practice, we shall request the reporter to set out the indictment in full.

The appeal has been ably argued on both sides and the experienced and distinguished counsel of the defendant addressed a very earnest appeal to us for the correction of the grave errors which he contends were made in the rulings upon the demurrer and upon the evidence, and we have responded in a careful and patient search for any error which would require or would justify a reversal of the judgment.

The proposition upon which the demurrer is based is, that the death of a woman resulting from a criminal abortion upon her is at common law murder, and the indictment, if it can at all be regarded as an indictment for homicide, is defective, because it charges death as the result of the abortion, but charges the defendant with the crime of manslaughter instead

of murder. It is contended that this defect is obvious from the fact that murder and manslaughter are different crimes and not different degrees of the same crime, and the further fact that there is no statute in this state reducing the character of the crime—when the death of the mother is caused by a criminal abortion—from murder to manslaughter.

<sup>236</sup> The principal reliance for this contention is the case of *State v. Moore*, 25 Iowa, 137, 95 Am. Dec. 176, in which the opinion of the court was delivered by Judge Dillon. The defendant was indicted for murder in the second degree by abortion. The defendant demurred to the indictment on the ground that the offense charged was not murder, because it had been held in Iowa that no act, though indictable at common law, could be punished as a crime unless the act was declared criminal by statute, and it was argued that as the statute defining and punishing murder was passed in 1851, and the statute making the procuring of an abortion unlawful was not passed until 1858, that the latter act, which says nothing about murder, could not make that murder which was not so before. The same question was also raised by a request to the court to instruct the jury that they might convict of manslaughter, which instruction was refused. The court held—and as we think properly—that the act of 1851 being unrepealed, continued to speak in 1858, and had the same force and effect as if it had been passed concurrently with, or subsequent to, the act of 1858, and therefore overruled the demurrer. But the question still remained whether, under that indictment, a conviction for manslaughter could be had. Upon that question the court cited the passage from Lord Hale (*Hale's Pleas of the Crown*, 429, 430), relied on here, as follows: "If a woman be with child, and any one gives her a potion to destroy the child within her, and she takes it, and it works so strongly that it kills her, this is murder; for it was not to cure her of a disease, but unlawfully to destroy the child within her; and therefore he that gives a potion to this end must take the hazard, and if it kills the mother it is murder." The court also cited to the same effect *Commonwealth v. Parker*, 9 Met. 263, 43 Am. Dec. 396, per Shaw, C. J., and in disposing of the demurrer said: "The crime we have seen was, at common law, murder, and under our statute is murder in the second degree. Under the charge, and under the evidence, the defendant was guilty of murder in the second degree or of nothing, and hence the court did not err in refusing to say to the jury that they might convict the de-

fendant <sup>237</sup> of manslaughter." Too great respect cannot be paid to the opinions of these eminent judges, but it is obvious that there must be some limitations to the doctrine thus alleged to be laid down by Lord Hale, and we are unwilling to adopt it as a hard-and-fast rule, even though fortified by Judge Shaw and Judge Dillon; and, as the state's attorney has pointed out, a careful examination of the chapter from which the above citation was taken will show that the word "murder" was not necessarily used in its technical sense, but as equivalent to homicide, embracing both murder and manslaughter.

But whatever may have been the severity of the earlier common law, the proposition is too broadly stated that death resulting from criminal abortion has always been murder at common law. The crime of abortion is a misdemeanor only at common law, and our statute, while broadening the scope of the common law and increasing the punishment, still leaves the crime a misdemeanor. For this reason, as stated in Clark's Criminal Law, page 161, "causing the mother's death in attempting an abortion is only manslaughter at common law, if the attempt is not made in a way that endangers the mother's life. In the latter case it is murder." It is only in jurisdictions where abortion is raised by statute to the grade of felony that causing the death of the mother is necessarily murder: Clark's Criminal Law, 191, 174. Mr. Wharton says in his Criminal Law, section 325, that where there is no intent to kill or to inflict grievous injury, and no likelihood of such result, the offense is but manslaughter; and in section 318 of his work on Homicide he says: "Whether the offense is murder or manslaughter depends largely on the intent as appearing on the whole case. If the intent was to kill or grievously injure her, the offense is murder. It is manslaughter if the intent was only to produce the miscarriage, the agency not being one from which death or grievous injury would be likely to result."

It is common knowledge that death is not now the usual, nor, indeed, the always probable, consequence of an abortion. The death of the mother doubtless more frequently resulted in the days of rude surgery, when the character and properties <sup>238</sup> of powerful drugs were but little known, and the control over their application more limited. But in these days of advanced surgery and marvelous medical science and skill, operations are performed and powerful drugs administered by skillful and careful men without danger to the life of the patient. Indeed, it is this comparative immunity from danger to the woman which



has doubtless led to the great increase of the crime, to the establishment of a class of educated professional abortionists, and to the enactment of the severe statutes almost everywhere found to prevent and punish this offense. The woman takes her life in her hands when she submits to an abortion, be she wife or maid, but her death is no necessary element in the procuring of an abortion, and the application of the harsh rule here contended for would have no effect in the repression of that abhorrent crime, which can only be efficiently dealt with by severity in the enactment and administration of the law punishing the attempt upon the life of the unborn child.

In the late case of *Peoples v. Commonwealth*, 87 Ky. 492, 9 S. W. 509, 810, the law upon this subject is well reviewed, and the doctrine announced in *Clark and Wharton*, as we have stated it, is approved and adopted. In *Regina v. Gaylor*, 7 Cox C. C. 253, decided in 1857, the indictment was for manslaughter by abortion, and the prisoner was convicted. The evidence showed that the prisoner was clearly guilty of being accessory before the fact to the woman taking the drug with intent to procure an abortion, and the judge reserved the case for the opinion of the court of criminal appeal. It was heard before Pollock, C. B., Bramwell, and Watson, BB., and Erle and Willes, JJ. Erle, J., before whom the case was tried, said: "This would, in my opinion, be murder if she died in consequence of taking that drug. But the grand jury found that it was manslaughter. If a man is indicted for manslaughter, and it turns out to be murder, he may be found guilty of manslaughter. In this case I thought he was guilty of murder by administering the drug, and might therefore be convicted of manslaughter."

<sup>239</sup> The judges affirmed the conviction, but without giving their reasons for doing so.

If the present indictment had been for murder, as it is contended it should have been, there can be no doubt a conviction of manslaughter would have been good: *State v. Flannigan*, 6 Md. 167; *Davis v. State*, 39 Md. 355; so that the defendant is in the singular position of complaining of an indictment because it does not subject him to conviction for a graver offense than that with which he is charged. But Mr. Wharton says, in section 390 of his *Criminal Law*: "Where there is no intent either to take the life of the mother, or to do her grievous bodily injury, the proper course is to indict separately for the man-

slaughter of the mother and for the perpetration of the abortion."

Courts in this state constantly instruct grand juries that they ought not to indict, if, upon the evidence produced by the state, they would not convict if sitting as petit jurors, and, for the same reason, if, upon the evidence of the state, they would not convict of the higher offense if sitting as petit jurors, they would be justified, with the advice of the state's attorney, in refusing to subject the accused to the danger of conviction upon a charge of which the accusing body would not, upon that evidence, convict him: See *Yundt v. People*, 65 Ill. 372.

We can discover no defect in this indictment which a demurrer could reach, and we think there was no error in overruling it.

The defendant also contends that the indictment does not charge any form of homicide, but is for the statutory offense of abortion, and that for this reason no dying declaration can be received. But this contention cannot be sustained. It is certain that dying declarations can only be received where the death of the deceased is the subject of the charge and the circumstances of the death the subject of the declaration: 1 Greenleaf on Evidence, sec. 156; Wharton on Criminal Evidence, sec. 276. But in prosecutions for abortion the death of the woman is no part of the facts which go to constitute the crime. That is complete, <sup>240</sup> with the death or without it. It is not a constituent element of the offense: *Railing v. Commonwealth*, 110 Pa. St. 100, 1 Atl. 314. A comparison of this indictment with our statute defining and punishing abortion must make it evident that no competent pleader could have so framed an indictment under that statute. It makes no pretense of conforming to the fundamental rule of safety—to follow the language of the statute. No inference to sustain the defendant's contention can be drawn from the use of the words "without legal justification," because the defense that the act was necessary to save the life of the mother is equally a defense to an indictment for the murder or manslaughter of the mother, and to an indictment under the statute for an abortion: 1 Wharton on Criminal Law, sec. 595. The corpus delicti of the offense of abortion is the destruction of the unborn infant, and the form given by Bishop (Bishop's Directions and Forms, sec. 138), requires an averment that in consequence of the means used "the life of the said child was then and there destroyed, and it was then and there prematurely born"; no averment of this character is

to be found in this indictment, which closely follows the form given by Bishop, *supra*, section 528, for general use where the corpus delicti is the death of the mother. In *People v. Olmstead*, 30 Mich. 439, where the indictment was for manslaughter by abortion, the court said: "Manslaughter, at common law, very generally consisted of acts of violence of such a nature that indictments for murder and manslaughter were interchangeable by the omission or retention of the allegation of malice, and of the technical names of the offenses." The learned judge before whom this case was tried, in the ruling which counsel reduced to writing and incorporated in the record, has stated the law as clearly as possible in these words: "This is not an indictment for abortion. It is an indictment which charges manslaughter, and the facts of the abortion are simply alleged there as going to show what caused the death, just as if it had been alleged that the means of death were by shooting her with a pistol." There can, therefore, be no doubt that under such an indictment dying declarations <sup>241</sup> are receivable. We now come to the exceptions to the testimony.

Evidence was admitted of three distinct dying declarations made by the deceased; one to Dr. Strauss and to Dr. Jones on Wednesday, two days before she died; one to her mother on Thursday afternoon, the day before she died, and one to her father, mother, and sister on Friday, the day of her death. Defendant's counsel in his brief states that the objection to the admissibility of the evidence embraced in the seventh and eighth exceptions is that the indictment is in reality an indictment for abortion under the statute, so that these exceptions may be eliminated without consideration, in view of our determination that the indictment is not for abortion but for homicide. We will add, however, that we have examined them, and, if deemed material, they would fall within the disposition to be made of the others. The first exception is upon the ground that no proper foundation was laid to justify the admission of any dying declaration. Dr. Conrad Strauss, her attending physician, was called in Saturday night. He saw her once on Sunday, and on Monday, twice on Tuesday, twice or three times on Wednesday, once on Thursday, and once on Friday, the day of her death. He detected blood poisoning and suspected an abortion. Until Wednesday he had favorable hope of the case, but she became worse that day, and he became alarmed, and called in Dr. Jones. She constantly declared she expected to die, so repeating daily from Monday up to the time



of her death, and begging him to save her as she was dying. He held out hope of recovery, but this did not change her belief, she continuing to declare she expected to die. The principle on which dying declarations are received is too familiar to require statement, but it is essential that actual danger of death must exist—that there is full belief that it is actually impending—and that death ensues. Any expressed or clearly visible hope of recovery will render the declaration inadmissible. But the declarant's own belief at the time is the criterion of admissibility: 1 Greenleaf on Evidence, sec. 158. It is not material that others, even the physician, <sup>242</sup> thought differently and held out hopes of recovery: *People v. Simpson*, 48 Mich. 474, 12 N. W. 662, per Cooley, Campbell, and Marston; *Regina v. Peel*, 2 Fost. & F. 21. The rule in such cases is stated in 2 Taylor on Evidence, section 718, as follows: "A firm belief that death is impending, by which is meant, not as once thought, a belief that it will follow almost immediately, but that it will certainly happen shortly in consequence of the injury sustained is sufficient to render the statement evidence, though the sufferer subsequently express a hope of recovery, or may chance to linger on for some days, or even two or three weeks." We think the testimony of Dr. Strauss measured up to the strictest requirements of the law, and that the court did not err in permitting the state to ask for her declaration.

The proper foundation being laid, Dr. Strauss stated, after exception to the question—what statement she made—that on Wednesday, in the presence of Dr. Jones, she told him Dr. Worthington had committed this abortion on her, but that she did not say what Dr. Worthington, to all which defendant objected, and this constitutes the second exception. It is urged that this does not identify the accused, but this is for the jury. He was free to show that there were other doctors of that name in Baltimore, or to show any other fact which would destroy or impair the weight of her declaration as identifying him. The state produced another Dr. Worthington, who swore that he never treated nor saw the deceased, and, if there were still others, not discovered by the state, that fact would not be likely to escape the vigilance of the defendant and of his counsel. We think there was no error in this ruling.

The third exception arose in this way. Dr. Jones testified that on Wednesday she declared in his presence she expected to die and also that she stated who had committed the abortion on her. Counsel for defendant then asked if this was before

or after she had declared her expectation that she would die, and he replied that he could not recollect; and counsel objected to his answering the question unless he could first <sup>243</sup> say that it was after she had declared to him her expectation that she would die, but the court overruled the objection and admitted the question. In this there was no error. It was only necessary that the declaration she expected to die should, in fact, precede the dying declaration. Dr. Strauss had already fixed this declaration of belief as made before the dying declaration, both on that day and on the two preceding days. The belief was a continuing belief, as appears from all the circumstances of the case, and we can discover no error in the ruling. This ruling disposes of the fifth exception, which is identical in principle with the third.

The fourth exception arose upon these questions to Dr. Jones:

"Question by Governor Whyte: Tell us what she said about expecting to live? A. She said she expected to die. Q. Did she say so? A. As far as I know. I don't remember the exact words, but only give my impression. (We object unless the words are given.)

"Question by state's attorney: What was the impression made on your mind as to what she said?"

To this question counsel for defense objected, but the court overruled the objection, and permitted the question to be asked. It is manifest that the impression spoken of by Dr. Jones, and asked for by the state's attorney, is not an impression of the subject of the declaration, but of the substance, the form in which it was expressed; that, in fact, it was rather the recollection than the impression of the witness which was sought, and which he intended to give. The law does not require that the very words be repeated: Wharton on Criminal Evidence, 9th ed., sec. 461. We therefore think this ruling correct.

The sixth exception relates to Dr. Jones' testimony also. He stated she said an abortion had been performed on her, but he could not recollect whether she said by whom. The court then asked: "Was it stated in her presence by whom this operation was performed? A. It was, sir. Q. Did she assent to that statement? A. I believe she <sup>244</sup> did, sir. Q. Were you present when Mr. Worthington's name was mentioned? A. I was, sir. Q. Mentioned in what connection? A. In regard to this abortion. Q. Who mentioned it? A. I don't remember that, sir." The exception seems to be that Dr. Worthington's name was put into the mouth of the deceased. But the dec-

larations may be in response to leading questions, or even to urgent solicitation: 1 Greenleaf on Evidence, sec. 159; Bishop's New Criminal Procedure, sec. 1213. The assent may be by a mere pressure of the hand, or otherwise: Bishop's New Criminal Procedure, sec. 1213; Commonwealth v. Casey, 11 Cush. 417, 59 Am. Dec. 150. We can perceive no error in this ruling.

The ninth and last exception was taken to the testimony of the deceased's sister, Mrs. Papf, who was present just before she died, when she told the minister, who had come to pray with her, that she was dying in the arms of Jesus, and that Officer Allgire and Dr. Worthington were the cause of her trouble. This exception was not argued before us, and is not mentioned in the brief of the defendant, and it is difficult to imagine upon what ground it could be attacked, unless it be for want of identification of the accused, which we have already considered in disposing of the second exception.

Finding no error in any of the rulings of the court, the judgment must be affirmed.

Judgment affirmed with costs above and below.

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**The Crime of Causing Abortion** is the subject of the monographic note to *Abrams v. Foshee*, 66 Am. Dec. 82-91.

**Evidence.**—To make dying declarations admissible, it must clearly be shown that they were made with the full knowledge and belief that death was imminent and without hope or expectation of recovery: *State v. Furney*, 41 Kan. 115, 13 Am. St. Rep. 262, 21 Pac. 213; *State v. Johnson*, 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229. Such declarations in answer to a leading question are admissible: *Vass v. Commonwealth*, 3 Leigh, 786, 24 Am. Dec. 695. See, too, *Commonwealth v. Casey*, 11 Cush. 417, 59 Am. Dec. 150. The fact that an attending physician holds out some hope of recovery does not render the declarations inadmissible: *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93. Dying declarations of the victim of an abortion are admissible on a prosecution for death thereby: *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815. But see *State v. Harper*, 35 Ohio St. 78, 35 Am. Rep. 596; note to *Abrams v. Foshee*, 66 Am. Dec. 91.



## ALLEN v. NATIONAL STATE BANK.

[92 Md. 509, 48 Atl. 78.]

**TAXATION OF MORTGAGES HELD BY NONRESIDENTS.**—A state may tax all mortgages, or the interest stipulated for thereon, on land within the state, in the county where the land is situated, no matter whether such mortgages are owned by citizens of the state or by nonresident individuals or corporations.

S. A. Williams, I. Rayner, and F. R. Williams, for the appellant.

G. L. Van Bibber, for the appellee.

**510 FOWLER, J.** Mrs. Hinchman and her husband executed a mortgage for the sum of eleven thousand five hundred dollars, dated the 6th of March, 1899, and therein covenanted to pay to the mortgagee, the National State Bank of Camden, New Jersey, a nonresident corporation, or its assigns, interest upon the mortgage debt at the rate of six per centum per annum. The mortgagors are also nonresidents, but the lands mortgaged are located in Harford county, in this state. The mortgagee was duly assessed upon the assessment-books of Harford county for the year 1899, upon the gross amount of the mortgage interest, and a tax of eight per centum was duly levied upon such assessment for state and county taxes for said year, and placed in the hands of Edward M. Allen, who is authorized by law to collect and receive all state and county taxes duly levied and legally collectible. The mortgagee has refused to pay the tax so levied amounting to the sum of fifty-five dollars and twenty cents, and this suit was brought to recover it. The mortgagee, the defendant below, pleaded the general issue, and that it is a corporation formed under the laws of the United States for the purpose of transacting a general banking business at Camden, in the state of New Jersey, and that its domicile is in said city. The case was tried before the court without a jury, and the learned judge below granted the defendant's prayer asking him "to rule as a matter of law that it being admitted by the pleadings that the defendant is a nonresident of the state of Maryland, it is therefore not liable in this action for taxes upon the income of the mortgage held by it upon real estate in Harford county, Maryland, and the plaintiff is not entitled to recover."

**511** The clerk was directed by the court to enter judgment for the defendant, but no judgment appears by the record to

have been actually entered. However, an agreement by counsel has been filed intended to perfect the record so as to present the case as fully as though the facts therein agreed to and the ruling of the court were embodied in a formal bill of exceptions duly signed. We will, therefore, proceed to dispose of the questions sought to be presented by this appeal without regard to the defects in the record.

The questions to be considered are: 1. Whether section 146A of the act of 1896, chapter 120 (Poe's Supplement, art. 81, sec. 146A, p. 551), so far as it taxes the interest covenanted to be paid in mortgages on lands in Maryland held or owned by non-resident mortgagees, citizens of other states, is a valid and constitutional exercise of the taxing power of the legislature; and 2. If the legislature has such power, did it intend to exercise it by the passage of the act above mentioned? No question is made as to the amount of the tax levied in this case, but the question is whether any such tax can be levied.

The provisions of section 146A are as follows: "All mortgagees or assignees holding mortgages of record in this state shall annually pay a tax of eight per centum upon the gross amount of interest covenanted to be paid each year to said mortgagee or his assigns by the mortgagor to be collected by the proper authorities, as other taxes for county and state purposes in the several counties, . . . and the tax hereby levied shall each year be paid in the county . . . where the greater portion of the property covered by the mortgage is located."

In the first place, this court has already held that the act in question is valid in respect to mortgagees residing in this state, the land mortgaged being also located here. In the case of *Faust v. Twenty-third etc. Bldg. Assn.*, 84 Md. 186, 35 Atl. 890, we held that "the power of the legislature to tax mortgage debts has been frequently exercised, and it has been recognized by the decisions of this court. If any doubts," continues the court, "have <sup>512</sup> heretofore existed, they are set at rest by section 51, article 3, of the constitution, as amended by the act of 1890, chapter 426." The amendment is in these words: "But the general assembly may by law provide for the taxation of mortgages upon property in this state and the debts secured thereby in the county or city where such property is situated." The method of carrying out this constitutional provision was also approved in the same case. "The tax levied," said Bryan, J., delivering the opinion of the court, "cannot be considered as excessive or unjust. Eight per centum on the interest, even

if it should be six per centum, would be forty-eight cents on the one hundred dollars of principal. . . . The adjustment shows on its face a studious effort to discharge a public duty in a spirit of justice and moderation. The assessment and levy were made in the legitimate exercise of the powers of the legislature in relation to subjects confided to its discretion, and it is our duty to declare them valid." It is true that the tax is levied upon the interest and not directly upon the mortgage debt, but this method which we approved in *Faust's case*, *supra*, is only another method of taxing the latter, and the rate of taxation is determined by a percentage of the interest.

1. Having, therefore, determined that the act in question is valid so far as it applies to resident mortgagees holding mortgages on land in Maryland, is it valid as to nonresident mortgagees owning mortgages of the same character?

Upon general principles, it would seem that there ought to be no difficulty in answering this question in the affirmative. It is one of the axioms of the law of taxation that the state has the right to tax all persons and all property of every kind within its jurisdiction: *McCulloch v. Maryland*, 4 Wheat. 316. But it is contended that the interest of the mortgagee is in the nature of a chose in action, and that according to the well-settled rule, here and elsewhere, such property must be assessed and taxed to the owner where he has his domicile. The case of *Appeal Tax Court v. Patterson*, 50 Md. 366, is cited to sustain this proposition. It is there said that property of a nonresident cannot be taxed unless it has an actual situs <sup>513</sup> within this state, so as to be under the protection of its laws. But what was actually decided in that case was that a resident of Maryland owning stocks, bonds, and other certificates of public debt issued by other sovereign states, or by municipalities created by them which are exempted by the states issuing them may be taxed by this state. Conceding, for the present, that the interest of the mortgagee is in the nature of a chose in action, the general rule that its situs for taxation is the residence of the owner is a mere fiction of law, and "yields whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined, and whenever the legislative intent is manifested that this legal fiction should not operate": *Green v. Van Buskirk*, 7 Wall. 139; *Bristol v. Washington Co.*, 177 U. S. 141, 20 Sup. Ct. Rep. 585; *Hervey v. Rhode Island Works*, 93 U. S. 664; *St. Louis v. Ferry Co.*, 11 Wall. 428. In *Patterson's case*, *supra*, it is said: "The general rule, '*mobilia sequuntur personam*,'



relied on by appellant, is far from being of universal application, and has been qualified by numerous exceptions in cases of taxation." The act we are considering expressly provides that the interest of the mortgagee shall be taxed, not where he resides, but in the county or city where the mortgaged land is located. So that the case of *Latrobe v. Mayor of Baltimore*, 19 Md. 13, and that of *Mayor of Baltimore City v. Stirling*, 29 Md. 49, cited to maintain the proposition that a mortgage debt is taxable at the residence of the creditor, are not applicable here. And so there are many instances that can be cited where the express provisions of tax laws take the place of this fiction. Thus, in this and many other states shares of the capital stock of corporations which are choses in action and which are owned by nonresidents are taxed by express provision of statutes where the corporation is located and not where the owner resides.

In the case of *Savings etc. Soc. v. Multnomah Co.*, 169 U. S. 421, 18 Sup. Ct. Rep. 392, this very question appears to have been disposed of. Gray, justice, in delivering the opinion of the court said: "By the law of Oregon, as of some other states of the Union, a mortgage of real property does not convey the legal title to the <sup>514</sup> mortgagee, but creates a lien or encumbrance as security for the debt; and the right of possession as well as the legal title remains in the mortgagor both before and after condition broken, until foreclosure. Notwithstanding this, it has been held both by the supreme court of Oregon and by the circuit court of the United States for the district of Oregon that that state has the power to tax mortgages of land there, though owned and held by citizens and residents of other states." The conclusion reached by the supreme court of the United States in the case just cited is, that "although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest, and by way of security for the debt, it appears to us to be clear upon principle, and in accordance with the weight of authority, that this interest, like any other interest legal or equitable, may be taxed to its owner (whether resident or nonresident) in the state where the land is located, without contravening any provision of the constitution of the United States." In meeting the objection here relied on it is said in *Mumford v. Sewall*, 11 Or. 67, 50 Am. Rep. 462, 4 Pac. 585, one of the cases cited by Justice Gray in *Savings etc. Soc. v. Multnomah Co.*, 169 U. S. 421, 18 Sup. Ct. Rep. 392: "Concede that the debt accompanies the respondent's person and is without the jurisdiction of the state. But the

security she holds is Oregon security. It cannot be enforced in any other jurisdiction. It is local in Oregon as absolutely as the land it binds. Since the power of the state over the mortgage is as exclusive and complete as over the land mortgaged, the mortgage is subject to taxation by the state, unless there is constitutional limitation to the contrary."

It is suggested by the defendant that the decision by the supreme court of the United States based upon the Oregon statute has no analogy to the question before us—1. Because that statute in express terms "forbids any taxation of the promissory note or other evidence of debt secured by the mortgage; and with equal distinctness provides for the taxation, as real estate, of the mortgage interest in the land"; 2. Because that statute authorizes the amount of the <sup>515</sup> mortgage debt to be deducted from any assessment upon the mortgagor. Nor does our statute, the validity of which is here challenged, tax the evidences of debt secured by the mortgage, for in this case there are none. The thing taxed is the interest which, as we have said, is as much a part of the mortgage as the mortgage debt itself. Nor do we think that the fact that our statute does not in express terms tax the mortgage interest in the real estate, as land, affect its validity; for personal property, as the supreme court of the United States "has declared again and again may be taxed, at the place where the property is situated, even if the owner is neither a citizen nor a resident": *Savings etc. Soc. v. Multnomah Co.*, 169 U. S. 421, 18 Sup. Ct. Rep. 392. The situs of the mortgage interest for the purpose of taxation is fixed by our act in Harford county, where the land is located. Again, the fact that our statute makes no provision for deducting the mortgage debt from any assessment upon the mortgagor, is rather an objection to its justice and fairness than to its validity. Statutes taxing the land of the mortgagor and the mortgage debt to the mortgagee have been frequently declared valid in Maryland and other states: *Appeal Tax Court of Baltimore v. Rice*, 50 Md. 319; *Mayor etc. of Baltimore v. Canton Co.*, 63 Md. 237; *The Tax Cases*, 12 Gill & J. 117; *Allen v. County Commissioners of Harford County*, 74 Md. 294, 22 Atl. 398; *Augusta Bank v. Augusta*, 36 Me. 259; *Alabama Ins. Co. v. Lott*, 54 Ala. 499; *Goldgart v. People*, 106 Ill. 25. The case of *Bristol v. Washington County*, 177 U. S. 139, 20 Sup. Ct. Rep. 585, also fully sustains and affirms *Savings Soc. v. Multnomah Co.*, 169 U. S. 421, 18 Sup. Ct. Rep. 392. The attempt to distinguish *Bristol v. Washington*

County, from the case at bar is not successful, for in our opinion the provisions of our act fix the situs of the mortgage interest here taxed as clearly and fully as did the act of the parties there by placing the mortgage notes in the hands of an agent for collection and reloaning. In delivering the opinion of the court, Fuller, C. J., said that the withdrawal of the notes from the hands of the agent and the revocation of his power of attorney did not change the situs of the mortgage interest for taxation. "Persons are not permitted," he said <sup>516</sup> "to avail themselves for their own benefit of the laws of a state in the conduct of business within its limits, and then to escape their due contribution to the public needs through action of this sort, whether taken for convenience or by design."

2. We have thus far assumed that the interest of a mortgagee is a chose in action or something less than an interest in land. In this state, however, it has long been held that a mortgagee takes something more than a mere lien. Thus in *Cahoon v. Miers*, 67 Md. 576, 11 Atl. 279, Judge Miller referring to the opinion of our predecessors in the case of *Evans v. Merriken*, 8 Gill & J. 39, said: "That a mortgage does something more than merely create a lien for the debt; that upon its execution the legal estate becomes immediately vested in the mortgagee and the right of possession follows as a consequence; . . . that the legal estate is defeasible at law upon the payment of the mortgage debt at the time stipulated, but if this is not done it becomes indefeasible at law and defeasible only in equity. . . . But at law the title all the while is in the mortgagee. That decision," continues Judge Miller, "has been acquiesced in and recognized as the law of the state for more than half a century, and we see no good reason for overruling it now." In commenting upon *Cahoon v. Miers*, in *Duval v. Becker*, 81 Md. 547, 32 Atl. 310, Chief Judge McSherry said: "As between the mortgagor and mortgagee, therefore, the doctrine that the mortgagor is regarded as the real owner does not, and in view of the quality of the estate conveyed by the mortgage, cannot obtain to the extent of permitting the mortgagor by his own act to exempt from the lien and operation of the mortgage any part of the mortgage property." It will thus be seen that the interest of the mortgagee is treated by courts of law as real estate only so far as it may be necessary for the protection of the mortgagee and to give him the full benefit of his security: *Hutchins v. King*, 1 Wall. 58. But, as was remarked by Justice Gray in *Savings etc. case*, supra: "If the law treats the mortgagee's in-



terest in the land as real estate for his protection, it is not easy to see why the law should forbid it to be treated as real estate for the purpose <sup>517</sup> of taxation." As we have already seen our decisions, for his protection, do so treat it, and our act gives it a fixed situs in Harford county, where it was taxed. But in this state the mortgagee at law becomes vested with the legal estate, and therefore he may maintain an action of ejectment: *Ahern v. White*, 39 Md. 422, 423. If this be so, then at law the mortgagee has a title to an interest in the land and therefore has property in this state subject to taxation. The tax imposed by the act of 1896 we are considering does not impose the tax on the nonresident, but the money due on the mortgage is taxed: *The Tax Cases*, 12 Gill & J. 117; *Allen v. Commissioners of Harford County*, 74 Md. 294, 22 Atl. 398; *Bank Tax Case*, 2 Wall. 200. Therefore, whether the interest of mortgagee be held to be merely a chose in action or lien, or an interest and estate in the mortgaged land, it would seem to be clear that it is taxable in the state where the land is located. A different view was expressed in the case of *State Tax on Foreign-Held Bonds*, 15 Wall. 300, but Justice Gray says of that case in the *Savings Society* case supra: "The remarks in the opinion . . . . went beyond what was required for the decision of the case and cannot be reconciled with other decisions" of the supreme court of the United States.

3. The only remaining question to be considered is, assuming that the legislature has the power, did it intend by the act of 1896, chapter 120, section 146A, to levy a tax upon the property of nonresident mortgagees.

Certainly, nothing can be found in the language of the act which would indicate that any exception or exemption was intended. The language is comprehensive and general, and includes nonresident as well as resident mortgagees. In the construction of revenue laws it is well settled that every presumption is to be made in favor of the state, and if a freedom from taxation or an exemption is claimed, the burden is upon the taxpayer to show clearly that either the one or the other exists. Inasmuch as we have held that it is within the power of the legislature to tax the interest of nonresident mortgagees, we think it follows both from the general and comprehensive <sup>518</sup> terms of the statute, as well as from the result that would follow if we should hold otherwise, that all mortgagees are included. For it is apparent that if we hold that only resident mortgagees and their resident assigns can be taxed under our pres-

ent law, the law itself would be rendered nugatory by the assignment of all mortgages to nonresidents.

Judgment reversed, with costs, and new trial ordered.

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**Mortgages of Nonresidents may be Taxed where recorded:** *Mumford v. Sewall*, 11 Or. 67, 50 Am. Rep. 462, 4 Pac. 585. See, further, the monographic note to *Buck v. Miller*, 62 Am. St. Rep. 455, 457.

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## MAYOR AND CITY COUNCIL OF BALTIMORE v. LYMAN.

[92 Md. 591, 48 Atl. 145.]

**OFFICER, WHO IS NOT.**—A person who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties, and exercises no powers depending directly on the authority of law, but simply performs such duties as are required of him by the persons appointing him, and whose responsibility is limited to them, is an employé, and not an officer, and does not hold an office.

**OFFICER—WHO IS NOT.**—A SUPERINTENDENT of public instruction legally appointed by a board of school commissioners, who takes no official oath, gives no official bond, has no commission issued to him, no fixed or definite tenure of office, but holds at the pleasure of such board, having and exercising no power except what is derived from and through such board, is simply an employé or agent thereof, and is not an officer, nor within the requirement of a city charter that all municipal officers shall be registered voters of the city.

E. H. Gans, W. A. Fisher, and O. Bryan, for the appellant.

K. A. M. Scholtz and G. T. Mister, for the appellee.

609 **BRISCOE, J.** The question in this case being one of public importance, and being a matter affecting the public school system of Baltimore City, we announced our decision in the case shortly after the argument in a per curiam order. We will now state the reasons for the conclusion reached by us at that time.

It is admitted that the record of the case presents but a single question of law for our consideration and that is, whether the superintendent of public instruction in the city of Baltimore is a municipal official, within the meaning and intent of the city charter.

610 The twenty-sixth section of the charter (Acts 1898. c. 123) provides that no person shall at any time hold more than

one office yielding pecuniary compensation under the mayor and city council of Baltimore. All municipal officials, except females, shall be registered voters of the city of Baltimore.

The facts of the case are few and are not disputed. Briefly stated they are as follows: The board of school commissioners of Baltimore City, in pursuance of the power conferred on it by section 100 of the city charter, appointed Mr. James H. Van Sickle superintendent of public instruction, to take effect from the first day of July, 1900. At the time of Mr. Van Sickle's appointment and of the filing of the bill in this case, he was not a registered voter of the city of Baltimore. The bill is filed by a resident and taxpayer of Baltimore City, to enjoin the mayor and city council of Baltimore, the comptroller and the board of school commissioners, from paying his salary, for the reason that not being a registered voter of the city, he was not eligible to the position to which he had been appointed. The determination of the question depends upon an examination of the charter itself and the ascertainment of what persons the legislature intended should be included in the use of the term "municipal official" in section 26 of chapter 123 of the acts of 1898 (City Charter).

It appears from an examination of the charter that the expression "municipal officials" is used to describe the heads of departments, heads of subdepartments, and municipal officers not embraced in a department, and is not applicable to employes of these several departments. By section 25 of the charter, the mayor has the sole power of appointment of all heads of departments, heads of subdepartments, municipal officers, not embraced in a department, subject to confirmation by the second branch of the city council, except where otherwise provided by the charter. The city comptroller and surveyor are elected by the people, and the city register and public printer are appointed by joint convention of the two branches of the council: Secs. 33, 35, 205, 208.

<sup>611</sup> The appointment of the other city officials is provided by the twenty-eighth section which reads "that the heads of departments, heads of subdepartments, municipal officers not embraced in a department and all special commissions or boards shall have the sole power of appointment and removal at pleasure of all deputies, assistants, clerks, and subordinate employes employed by them, unless otherwise provided for."

Now, under the charter, section 100, the superintendent of public instruction and his assistants are appointed by the board



of school commissioners, the head of the department of education, and the qualification there prescribed is, "that the superintendents shall all be persons of education and experience in the management of schools, and they shall be not less than twenty-five years of age at the time of their appointment, and shall discharge the duties herein prescribed and such other duties as the said board may direct."

It appears, then, from the foregoing sections of the charter, that the superintendent of public instruction is not appointed by the mayor, or joint convention or elected by the people, but is appointed by the board of school commissioners, the head of the department of education, and is an employé of this department of the city government.

Judge Cooley, in the case of *Throop v. Langdon*, 40 Mich. 683, where it is held that the position of chief clerk in the office of the assessors of the city of Detroit was not an office, says: "The officer is distinguished from the employé in the greater importance, dignity, and independence of his position; in being required to take an official oath and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance in office, and usually, though not necessarily, in the tenure of his position. In particular cases other distinctions will appear which are not general." In *Olmstead v. Mayor etc.*, 42 N. Y. Sup. Ct. 482, it was held that one who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties, and exercises no powers depending directly on the authority of law, but simply performs such <sup>612</sup> duties as are required of him by the persons employing him and whose responsibility is limited to them, is not an officer and does not hold an office. And in the recent case of *School Commrs. v. Goldsborough*, 90 Md. 207, 44 Atl. 1055, we said: Civil officers are governmental agents; they are natural persons in whom a part of the state's sovereignty is vested or reposed, to be exercised by the individuals so intrusted with it for the public good. The power to act for the state is confided to the person appointed to act. It belongs to him upon assuming the office. He is clothed with the authority which he exerts and the official acts done by him are done as his acts and not as the acts of a body corporate.

In the case now before us we find that the superintendent of public instruction is not appointed by the mayor, or elected by the people, or appointed by joint convention of the two branches of the council. He takes no official oath, gives no official bond,

has no commission issued to him, and has no fixed or definite tenure of office, but is appointed at the pleasure of the school board. It also appears from an examination of the charter that all the executive power relating to educational matters is vested in a department known as "the department of education," and this department is composed of the board of school commissioners. The superintendent of public instruction exercises no power except what is derived from and through this board. He is simply, then, an employé or the agent of the school board and not a municipal official, within the meaning of the charter. Nor do we find anything in the duties to be performed by him which indicate an office and not an employment within the meaning of the twenty-sixth section of the charter. In *State v. Vickers*, 58 Ohio St. 730, 51 N. E. 1102, it is held that a superintendent of schools is not an officer: *Butler v. Regents of the University*, 32 Wis. 131; *United States v. Germaine*, 99 U. S. 501.

We are, therefore, all of the opinion that section 26 of chapter 123 of the acts of 1898, providing that all municipal officials, except females, shall be registered voters of the city of <sup>613</sup> Baltimore has no application to the position of superintendent of public instruction.

It follows, then, that the order of the court below, overruling the demurrer to the bill will be reversed, the demurrer sustained and the bill dismissed.

Order reversed, demurrer sustained, and bill dismissed, with costs.

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**Officer.**—One who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties and exercises no powers depending directly on the authority of the law, but simply performs such duties as are required of him by the persons employing him, and whose responsibility is limited to them, is not an officer, although those employing him are public officers, and his employment is in and about a public work or business: See the monographic note to *Thomson v. Kyle*, 63 Am. St. Rep. 193. Consult, also, the recent case of *Patton v. Board of Health*, 127 Cal. 388, 78 Am. St. Rep. 66, 59 Pac. 702.

**SUPREME CONCLAVE IMPROVED ORDER OF HEPTASOPHS v. MILES.**

[92 Md. 613, 48 Atl. 845.]

**BENEFIT ASSOCIATIONS — EVIDENCE.**—In an action against a benefit society the admission in evidence of a preliminary application for membership, not in the form prescribed by the charter, is harmless error if the authorized application upon which the member was admitted is afterward produced in evidence, when the issue is whether the applicant became a member of the order with intent to commit suicide in fraud thereof. .

**BENEFIT ASSOCIATIONS—EVIDENCE.**—If, in an action against a benefit society, there is no question as to the sufficiency of proof of the death of the member, the admission in evidence of a letter by the secretary of the society to the beneficiary acknowledging the receipt of proof of the death, if error, is harmless.

**BENEFIT ASSOCIATIONS—EVIDENCE OF INTENT OF MEMBER TO COMMIT SUICIDE.**—If, in an action against a benefit society to recover a death benefit, the defendant offers evidence to show that the deceased joined the society with intent to defraud it by committing suicide, the plaintiff may show in rebuttal, by a witness who had an opportunity to observe the deceased the day before he killed himself, that the suicidal purpose had overtaken him after his joining the society.

**INSURANCE—LIFE—SUICIDE OF INSURED AS DEFENSE.**—If a life insurance policy does not provide that it shall become void in the event of the suicide of the insured, his suicide while sane is not a defense to an action on the policy by the beneficiary, unless the policy was obtained by the deceased with intent to commit suicide and thus defraud the insurer.

**INSURANCE, LIFE—BENEFIT SOCIETY—SUICIDE AS DEFENSE.**—If the membership certificate, constitution, or by-laws of a benefit society contain no provision qualifying the right to recover the benefit if the insured member takes his own life, his suicide is not a defense as against his beneficiary, unless the member joined the society with intent to commit suicide, and the burden to show such intent is upon the defendant.

O. Bryan, for the appellant.

A. L. Miles, J. B. Mills, and A. P. Gorman, Jr., for the appellees.

**618 JONES, J.** This suit was instituted in the court of common pleas of Baltimore City against the appellant, a mutual benefit association, duly incorporated under the laws of Maryland, by one Nathan J. P. Tull, to recover the amount of a benefit certificate issued by the said corporation to one Miles Tull, a son of the plaintiff, and made payable to the plaintiff. Pending the suit the said plaintiff died, and the appellees here, upon suggestion of his death, became parties plaintiff as ad-



ministrators of his estate. The narratio in the case consisted of two counts, in each of which, after setting forth matter of inducement, it was alleged that the defendant made and delivered to said Miles Tull its certificate in writing and under seal, by which it promised and bound itself to pay to the plaintiff out of its benefit fund, within sixty days from the receipt of satisfactory proof of death of said Miles Tull, and upon the terms and conditions stated in said benefit certificate, the sum of five thousand dollars. It was then <sup>619</sup> alleged that the said Miles Tull had died while a member in good standing of said corporation, and that proof of his said death had been furnished the defendant in accordance with the requirements of said benefit certificate, but the defendant had refused payment of the sum so agreed to be paid.

The defendant pleaded: 1. That it did not promise as alleged; 2. That it was not indebted as alleged; 3. That it did not make its certificate of insurance as alleged; 4. That the death of said Miles Tull was "caused by one of the causes exempting said defendant from liability"; 5. That "said Miles Tull came to his death by a pistol shot deliberately aimed by his own hand, the manner of which death exempts the defendant" from liability under said benefit certificate; 6. That defendant never undertook by the said benefit certificate to pay the sum wherein named to the beneficiary named, or to anyone else upon the death of Miles Tull, if his "death was produced by his own unlawful act," and that said Miles Tull came "to his death in an unlawful manner by his own hand," and the defendant was therefore exempt from liability on account of said benefit certificate; 7. That defendant denied that it had promised and bound itself to make payment as alleged to the plaintiff, but that said promise was made upon the implied condition that the death of Miles Tull should result from causes which he could not control, and that his death was caused by his own deliberate, unlawful act, wherefore the defendant was released from every obligation on account of said benefit certificate, and the same was rendered null and void.

The plaintiff joined issue on the first, second, and third pleas, traversed the fourth plea, and replied to the fifth, sixth, and seventh pleas that the defendant is a mutual benefit association incorporated under the laws of the state, the object and purpose of which is to "provide an endowment fund to be paid to the family or friends of a deceased member"; that by the benefit certificate, the cause of action in the case, the defendant agreed to

pay to the plaintiff the sum of five thousand dollars as stipulated therein; that there is nothing <sup>620</sup> expressed in the certificate "whereby suicide or any other cause of death should exempt the defendant from liability" thereunder, and "there was no implied condition that the said Miles Tull should come to his death from causes which he could not control, or that if he came to his death by his own unlawful act, the defendant should be released and exempted from liability" to the beneficiary named in the certificate, and "therefore the obligation or promise of the defendant was not rendered null and void by the manner in which the said Miles Tull is alleged to have come to his death." The defendant joined issue upon the plaintiff's replications. No question was made upon the pleadings, and therefore they are not the subject of criticism here; but they have been referred to because they make more distinct the propositions upon which the court must pass in disposing of questions subsequently presented.

The plaintiffs offered in the trial of the case proof of the benefit certificate declared upon in the narratio, as the cause of action, the charter, constitution, and by-laws of the defendant, the application of Miles Tull for membership in the defendant corporation, proof of his death, and of notice thereof sent to the defendant as required by its by-laws; and that at the time of his death he was a member of the defendant corporation in good standing as defined in said laws. The defendant offered no evidence in denial or contradiction of that offered on the part of the plaintiff, but directed its proof to establish the averment of its pleas that Miles Tull had died by his own hand; and in that connection offered some evidence as tending to prove that he had made application for membership of the defendant corporation and become a member thereof, and obtained the benefit certificate therefrom upon which the suit was brought, with the intent to commit suicide. The plaintiffs offered evidence in rebuttal of this last-mentioned evidence on the part of the defendant. It nowhere appeared in the evidence that there was any condition annexed to, or made a part of, the benefit certificate sued on here, either by its own terms, or by any express provision in the charter, <sup>621</sup> constitution, or by-laws of the defendant corporation, that suicide should exempt the defendant from liability thereunder; nor was there evidence going to show, and it is not claimed, that Miles Tull was not of sound mind at the time of his death. Upon this state of proof the court below instructed the jury in

substance on behalf of the plaintiffs that if they found the facts offered in evidence by the plaintiffs they were entitled to recover, notwithstanding they might find that Miles Tull committed suicide, unless they should believe that at the time he made application for the benefit certificate sued on he did so with the intention of committing suicide, and that the burden of proving such intention was upon the defendant.

The main contention in the case is in regard to the proposition of law so asserted. Before making further reference to the instructions of the court, however, the exceptions appearing in the record will be reviewed in their order. There were three exceptions taken on the part of the defendant to the admissibility of testimony. The first of these was to the action of the court in allowing the plaintiff to offer in evidence what is styled the preliminary application of Miles Tull to be admitted to membership in the defendant corporation. This application does not conform to the requisites prescribed for an application for membership by the by-laws of the defendant, nor does it appear that authority is conferred upon a subordinate conclave of the order to prescribe any additional or different form of application from the one required in these by-laws. The offer of this preliminary application may therefore have been unnecessary, or of itself may not have been the proper evidence of application for membership. It is not perceived, however, how the defendant was injured by the admission of this evidence. It was followed up by the offer in evidence of the official and authorized application for membership upon which the member in question was admitted to the defendant's order, and upon which the benefit certificate sued on was issued to him; and the fact that Miles Tull made application in the prescribed form and thereupon became a <sup>622</sup> member of the defendant corporation is not controverted. Obviously, therefore, no injury was done to the defendant by admitting evidence of this preliminary application because the same was unnecessary or was not in the prescribed form. It was but cumulative testimony to an uncontroverted fact. Again, this preliminary application was dated July 13, 1898. It appears to have been received by the subordinate conclave of which the applicant became a member, and to which it was addressed on the 27th of the same month. The official application was dated August 1, 1898, and on the 3d of the same month the applicant was duly elected a member of the order. It was therefore a circumstance leading up to, connected with,



and reflecting upon the execution by the applicant of the official application and his admission to membership of the order. At the time that this evidence was offered no question had been made in the cause as to Miles Tull having applied for the benefit certificate, which is the cause of action, with a view to suicide. As has been seen, this issue was not made in the pleadings. But after this preliminary application had been admitted in evidence the defendant offered in evidence acts and declarations of the said applicant with the purpose of showing (and so tending) that the benefit certificate had been taken out by him with a view to suicide. These acts and declarations were all subsequent to the date of the official application. The facts in connection with the preliminary application thereupon became legitimate matter for the consideration of the jury, who were entitled to have all the facts and circumstances connected with the applicant's becoming a member of the defendant corporation before them in passing upon this question of intention. This being so, the fact that it was introduced into the case at a time when the propriety or necessity for it had not become apparent worked no injury to the defendant. The defendant cannot fairly claim, as was suggested on its behalf, that it was prejudiced by this evidence because of the terms of the instruction which had been referred to as granted on behalf of the plaintiffs, to the effect that the suicide of Miles Tull was not a bar to recovery by the plaintiffs in this <sup>623</sup> case unless the jury found "that at the time" he "made application" for the benefit certificate sued on "he did so with the intention of committing suicide," because the jury may have been misled thereby into believing that the intention to commit suicide must have antedated the preliminary application offered in evidence. It is not apparent how the jury could have been so misled. This preliminary application was not offered, and could hardly have been understood as having been offered, as the effective application in procuring the benefit certificate in question to be issued. The effective and official application was in evidence, and it was distinctly testified to before the jury that it was upon this last-mentioned application that the benefit certificate was issued. The other was spoken of as a preliminary application, and was distinguished by the witness who produced it from the "regular applications." Upon this state of evidence before the jury it cannot be said that they were misled into supposing that the language of the instruction which has been quoted required them to

have reference to the date of the preliminary application as the time when the intention of the applicant to commit suicide, if they found such intention must necessarily have been formed. There is, therefore, no ground for reversal in the defendant's first exception.

The defendant's second exception was to the ruling of the court in admitting in evidence a letter written to N. J. P. Tull, the beneficiary named in the benefit certificate sued on, by the supreme secretary of the defendant order, and dated at the office of the supreme secretary in Baltimore, which acknowledged the receipt by the said secretary of "the official proof of death of Miles Tull," and purported to be in reply to a letter of the said beneficiary. It is not necessary to notice this ground of exception further than to say that, whatever view may be taken of the admissibility of the evidence excepted to, the defendant was not injured by the action of the court in admitting it. The supreme secretary himself was the witness who identified and proved the letter. He, under the by-laws of the defendant, was the officer to whom the proofs of the <sup>624</sup> death of a member were to be transmitted. The letter was produced in connection with his oral testimony, to the effect that he had with him the proofs of death of Miles Tull, which he exhibited. No question seems ever to have been made of the fact of proof of death having been forwarded, or of its sufficiency under the by-laws of the defendant. What possible harm, therefore, could the admission contained in the letter excepted to have done the defendant? This exception, therefore, cannot be sustained.

The same is to be said of the third and last exception to testimony. This was taken to the ruling of the court in allowing an inquiry by the plaintiffs of a witness offered by them in rebuttal as to the apparent condition of Miles Tull when seen by the witness the day before his death. The defendant, with a view to showing that the said deceased, when he made application to become a member of the defendant corporation, did so with the intention to commit suicide, had offered evidence of the acts, declarations and conduct of the deceased from the time of his making the application to the time of his death. The plaintiffs in rebuttal produced a witness who had seen and had opportunity to observe the acts and conduct of the deceased during the period covered by this testimony of the defendant; and having shown by the witness this opportunity for observing the manner and conduct

of the deceased, and that the witness had seen and been with him the evening of the day before his death, asked the question, "What did his condition seem to be that Wednesday night when he left; was it different at all from his usual condition, and, if so, how different?" The question at issue was the existence vel non of an intention or purpose in the mind of the deceased at a particular time, to wit: A purpose to commit suicide at the time of his application to the defendant for the benefit certificate sued on in this case. The design and tendency of the question asked the witness were to show that the suicidal purpose in question was due to a condition that had overtaken the deceased subsequent to the time of his said application; and though probably the evidence elicited thereby <sup>625</sup> had but slight probative value, it was competent evidence to go to the jury for what it might be worth in rebuttal of the evidence on the part of the defendant in this connection which has been alluded to. It was not a question requiring the skill of an expert for an intelligent answer, as the defendant's counsel seemed to argue, but one that admitted of such answer by anyone who had the means of observing the deceased, which it appeared the witness had.

The defendant's fourth and last exception was taken to the action of the court upon the prayers. The plaintiffs offered six prayers, of which the court below granted the first, third and fifth, and refused the others. The defendant offered five prayers, all of which were refused. The proposition of law embodied in the first and third prayers of the plaintiffs has already been stated, and is to the effect that suicide by Miles Tull, the assured in the benefit certificate sued on, is no bar to a right of recovery in the case by the plaintiffs unless the jury should find from the evidence that the said assured, when he made application for the benefit certificate, did so with the intention of committing suicide, and the burden of proving such intention is upon the defendant. The first, second, and fifth prayers of the defendant asked that the jury be instructed that if the insured, Miles Tull, committed suicide when of sound mind, the plaintiffs were not entitled to recover, even though there was no clause in the benefit certificate issued to him rendering the policy void by reason of suicide; and that the act of suicide "rendered void the contract" between him and the defendant "for that there was no insurance against suicide," though this was not expressed in the contract as a condition of the insurance.



It is not entirely clear what is the precise proposition intended to be embodied in the defendant's third and fourth prayers. In each of them it is asserted that the plaintiffs are not entitled to recover if the jury find the facts set out, and the fact that suicide was the cause of death. But it is not pointed out in either of them what relation the jury must find between the other facts set out and the fact of suicide. The facts set out, <sup>626</sup> other than the fact of suicide, were those which the defendant had put in evidence to show that the assured had made application for the benefit certificate sued on with the intention of committing suicide. This intention, if found to exist, would be a fact in the case not established by direct and uncontroverted proof, but by inference from other facts which were in evidence; and if it was meant by these prayers to have the jury instructed as to the effect of such intention upon the plaintiffs' right of recovery, the fact of the existence of such intention ought to have been left to the jury to find; whereas the effect of the instructions as framed was to tell the jury that if they found the facts set out, other than the fact of suicide, they must accept them as proof that the application of the assured was made with the intention to commit suicide. In other words, that as matter of law these facts, if found, constituted such intention. The fourth prayer has the concluding paragraph that "if from all the evidence the jury shall find that the deceased entered into the contract described in the benefit certificate with the intention of committing suicide, then the plaintiffs cannot recover in this case"; but this hypothetical paragraph is inconsistent with the preceding part of the prayer in which it is affirmed just as it is in the third prayer, that if the jury find the facts set out and the fact of suicide, then the plaintiffs are not entitled to recover. It may be here said that the defendant did not make the fact of intention upon the part of the assured to commit suicide when he made application for membership in the corporation a ground for defense in its plea; but, nevertheless, having offered evidence of such fact, it had the benefit of having the jury instructed in the prayers granted on behalf of the plaintiffs to consider the evidence so offered; and as to what would be the effect of the fact it was offered to prove if they should find it. For reasons stated, the third and fourth prayers of the defendant were properly refused.

In support of the proposition embodied in its first, second, and fifth prayers, the defendant relies upon the case of *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. Rep. 300. The

plaintiff's counsel distinguishes this case from the one at bar by pointing out the <sup>627</sup> fact that in the Ritter case the insurance was effected for the benefit of the estate of the assured, while here it was so effected for the benefit of a third party. This of itself is not a complete answer to the defendant's contention. Without reviewing at length the facts of the case cited from 169 U. S., 18 Sup. Ct. Rep., supra, it may in brief be stated that the doctrine enunciated in that case was to the effect that, whether there was a clause or condition in a policy of insurance protecting the insurer against liability in case of self-destruction by the assured or not, death by suicide was a risk not to be considered as being in the contemplation of the parties to the contract at the time of entering into it, and was a risk not insured against; and further, that for reasons of public policy it is not a risk that can legally be covered by insurance. This doctrine does not appear from the reasoning of the court to have been stated as applicable only to the state of facts disclosed in the particular case, but to have been enunciated as one within the purview and reason of which the particular case fell. The scope of the decision was wider, therefore, than that imputed to it by the plaintiff's counsel; and this is found supported by direct authority. In the case of Supreme Com. K. of G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332, the court, upon a line of reasoning similar to that of the Ritter case, supra, virtually applied the doctrine enunciated in the last-named case to a state of facts showing that the plaintiff was the beneficiary of the insurance certificate in suit which had been issued to her husband by the defendant, a beneficial order; and that the husband who had taken out the certificate and nominated his wife, the plaintiff, as the beneficiary therein had met his death by suicide. Again, in the case of Hopkins v. N. W. Life Ins. Co., 94 Fed. 729, the circuit court for the eastern district of Pennsylvania held the doctrine enunciated in the Ritter case applicable to a case in which insurance had been taken out, payable to the wife of the assured, if living, and, in case of her death, to his children. The assured committed suicide, leaving his wife surviving him, and she was the plaintiff in the suit. This case was appealed to the circuit court of appeals of the United States (99 Fed. 199), and <sup>628</sup> affirmed upon other grounds, the appellate tribunal saying that it was not found necessary to review the grounds on which the decision of the lower court had been based.

But while the scope and effect of the case of *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. Rep. 300, seem to be as stated, and while there are authorities found as indicated, in support of the doctrine enunciated in that case as to the effect of suicide upon a contract of insurance, it appears that the doctrine in question has not generally prevailed. In *Joyce on Insurance*, volume 3, section 2653, it is said: "Even though there is no condition against suicide, the deliberate killing of himself by insured while sane, and with intent to secure the amount of the insurance to his estate avoids the policy. So if a life policy is taken out by insured not for his own benefit, but for the benefit of a third person, as in case where it is payable to the heirs or widow, and there is no stipulation that it shall be void in case of suicide or self-destruction of assured, then, as a general rule, suicide is no defense, for ordinarily the beneficiary is not bound by acts or declarations of the assured done or made by him after the issuance of the policy unless the same are in violation of some condition in the policy." Again, in *Bacon on Benefit Societies and Life Insurance*, section 337, it is said: "Where the policy, or the constitution and laws of the society or order, contain no provision qualifying the right to recover if the assured or member takes his own life, suicide is not a defense." The statements made by these authors as to the result of the authorities upon the question under consideration are fully sustained by the authorities to which they refer. Some of them may be given: *Mills v. Rebstock*, 29 Minn. 380, 13 N. W. 162; *Kerr v. Union Ben. Assn.*, 39 Minn. 174, 12 Am. St. Rep. 631, 39 N. W. 312; *Fitch v. American Popular Life Assn.*, 59 N. Y. 557, 17 Am. Rep. 372; *Darrow v. Family Fund Soc.*, 116 N. Y. 537, 15 Am. St. Rep. 430, 22 N. E. 1093; *Morris v. State Mutual Life Assur. Co.*, 183 Pa. St. 563, 39 Atl. 52; *Patrick v. Excelsior Life Ins. Co.*, 67 Barb. 202. It may be further said that, as against the doctrine that reasons of public policy ought to prevent recovery upon a policy of insurance, even in the absence of a stipulation or condition that suicide should avoid the policy when the assured takes his <sup>629</sup> own life, it is found that at least in one instance there is express statutory enactment that "it shall be no defense that the assured committed suicide, unless it shall be shown to the satisfaction of the court, or jury trying the cause, that the assured contemplated suicide at the time he made the application for the policy, and any stipulation in the policy to the contrary shall be void": See Mo. Rev.



Stats. 1889, sec. 5855, referred to in 2 Bacon on Benefit Societies and Life Insurance, sec. 347a.

In the case at bar, as has been seen, the question as to whether the application for the benefit certificate sued on was made with the intention to commit suicide, thereby vitiating in its inception the contract evidenced thereby, was submitted to the jury and was determined by their verdict, but the court refused to instruct the jury that, notwithstanding there was no condition in the contract between the defendant and the assured that the defendant should be exempt from liability to pay the insurance to the beneficiary in case the death of the assured occurred by suicide, the plaintiffs were not entitled to recover if the jury found the cause of death to be suicide. We think this ruling is in accordance with what has been the generally accepted doctrine in regard to suicide as a defense in cases of the nature of this. In the present case this doctrine can be very justly applied. The charter of the defendant stated the object of the incorporation thereunder to be "for beneficial purposes and to provide an endowment fund to be paid to the family or friends of a deceased member." Its constitution described one of the objects of the order to be "to create and maintain by stated and fixed contributions a benefit fund, from which, on satisfactory evidence of the death of a member, who has complied with all the lawful requirements of the order, a sum not exceeding five thousand dollars shall be paid to his beneficiary or beneficiaries." The whole spirit and design of the order is, according to its professed objects, to assist members and relieve them in sickness while they live and to provide for the needs of their families and friends in case of their death. Those of the families and friends of deceased members who are made objects of care by the order have no more control over the <sup>630</sup> cause of death than have the members of the order. Their need of assistance is the same whatever the cause of death. To refuse them this assistance for a cause over which they have no control would not accord with the expressed objects of the order, and would be contrary to the spirit which professedly prompted its organization.

The rulings of the court below upon all the prayers in the case based on the fact of suicide, being the first and third prayers of the plaintiffs and all of the prayers of the defendant, are affirmed for reasons appearing in the foregoing expression of views. The fifth prayer of the plaintiffs, which was granted, and which prescribes the rule of damages, though embraced in the general exception by the defendant to the action of the trial court upon the prayers, was not made the subject of criticism,

either at the oral argument or in the brief of defendant's counsel, and it seems not to have been seriously contested. The ruling upon this prayer will also be affirmed. It follows that the judgment of the court below must be affirmed.

Judgment affirmed with costs to appellees.

## **SELF-DESTRUCTION AS DEFENSE TO LIFE INSURANCE.**

- I. Presumptions and Burden of Proof.**
  - a. General Rule as to Presumptions.
  - b. Nearly or Equally Balanced Evidence.
  - c. Burden of Proof.
  - d. Presumption of Natural Death, What Sufficient to Overcome.
- II. Effect when Suicide is not Stipulated Against in Policy.**
  - a. Rule in State Courts.
  - b. Doctrine in National Courts.
- III. Accidental Self-killing or Unintentional Death.**
  - a. General Rule.
  - b. Death Due to the Negligence of the Insured.
  - c. Death from an Excessive Dose of Medicine.
- IV. Conditions Against Death in Violation of Law.**
- V. Conditions Against Death by "His Own Act or Hand," or "Self-inflicted Injury."**
  - a. Suicide While Sane.
  - b. Degree of Insanity.
- VI. Insanity as Affecting Defense of Suicide.**
  - a. Intentional Self-killing.
  - b. Inability to Understand Moral Character of Act and Irresistible Insane Impulse.
- VII. Presumption as to Sanity and Burden of Proof.**
- VIII. Suicide "Sane or Insane."**
  - a. Generally no Recovery can be Had.
  - b. If Unconscious of Effect of Act.
  - c. If Utterly Bereft of Reason or Totally Insane.
- IX. Effect of By-laws of Mutual Benefit Societies.**
  - a. Effect on Members of Laws Subsequently Passed.
  - b. Right of Board of Control to Add New Regulation.
- X. Effect of Incontestable Clause in Policy.**
- XI. Effect of Intent to Suicide When Taking Out Policy.**
- XII. Conflict of Laws—Policy Taken Out in One State, Death in Another.**

### **I. Presumptions and Burden of Proof.**

a. General Rule as to Presumptions.—In an action upon an insurance policy the presumption always prevails that the insured did

not kill himself. If nothing appears to the contrary, whether an insured person dies from the effects of insanity or any other disease or cause, the legal presumption is that he died a natural death, from natural causes, and not from an act of self-destruction. If he is found dead, the presumption is that his death was natural or accidental, and the mere fact of death in an unknown manner creates no legal presumption of suicide. Even upon equally balanced testimony, it is presumed that he died from natural, rather than from suicidal, causes: *Walcott v. Metropolitan Life Ins. Co.*, 64 Vt. 221, 33 Am. St. Rep. 923, 24 Atl. 992; *Guardian Ins. Co. v. Hogan*, 80 Ill. 36, 22 Am. Rep. 180; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, 7 Am. Rep. 410; *Connecticut Mut. Life Ins. Co. v. McWhirter*, 73 Fed. 444; *Keels v. Mutual Reserve Fund Life Assn.*, 29 Fed. 198; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. Rep. 1360; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116, 17 Am. St. Rep. 184, 43 N. W. 731; *Insurance Co. v. Bennett*, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723; *Agen v. Metropolitan Life Ins. Co.*, 105 Wis. 217, 76 Am. St. Rep. 905, 80 N. W. 1020; *Carnes v. Iowa etc. Assn.*, 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683.

**b. Nearly or Equally Balanced Evidence.**—If the evidence as to the death being accidental or suicidal is so nearly balanced as to leave the question in doubt, the presumption is in favor of the theory of accidental death: *Mutual Life Ins. Co. v. Wiswell*, 56 Kan. 765, 44 Pac. 996; *Keels v. Mutual Reserve Fund Life Assn.*, 29 Fed. 198; *Hale v. Life Indemnity Co.*, 61 Minn. 516, 52 Am. St. Rep. 616, 63 N. W. 1108; *Stephenson v. Bankers' Life Assn.*, 108 Iowa, 637, 79 N. W. 841.

**c. Burden of Proof.**—It naturally follows from the rules above stated that if the defense of suicide is set up to an action on a policy of life insurance, the burden of proving it is upon the defendant, if there is no concession on the part of the plaintiff that the insured came to his death by any other than a natural cause: *Hale v. Life Indemnity Co.*, 61 Minn. 516, 52 Am. St. Rep. 616, 63 N. W. 1108; *Walcott v. Metropolitan Life Ins. Co.*, 64 Vt. 221, 33 Am. St. Rep. 923, 24 Atl. 992; *Leman v. Manhattan Life Ins. Co.*, 46 La. Ann. 1189, 49 Am. St. Rep. 348, 15 South. 388; *Mutual Life Ins. Co. v. Wiswell*, 56 Kan. 765, 44 Pac. 996; *Schultz v. Insurance Co.*, 40 Ohio St. 217, 48 Am. Rep. 676; *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110; *Gooding v. United States Ins. Co.*, 46 Ill. App. 307; *Dennis v. Union Mutual Life Ins. Co.*, 84 Cal. 570, 24 Pac. 120; *German v. Brooklyn Life Ins. Co.*, 30 Hun, 535; *Fidelity Co. v. Weise*, 80 Ill. App. 499; *Inghram v. National Union*, 103 Iowa, 395, 72 N. W. 559; *Home Benefit Assn. v. Sargent*, 142 U. S. 691, 12 Sup. Ct. Rep. 332; *Mutual Life Ins. Co. v. Simpson* (Tex. Civ. App.), 28 S. W. 837. And if, in such case, circumstantial evidence alone is relied upon, it must be of such character as to exclude, with reasonable certainty, any other cause of death: *Leman v. Manhattan Life Ins. Co.*, 46 La. Ann. 1189,



49 Am. St. Rep. 348, 15 South. 388. If the insurer pleads as a defense that the insured committed suicide, by reason of which the policy is void, the burden of establishing such defense rests upon the insurer throughout the trial: *Supreme Lodge Knights of Pythias v. Beck*, 94 Fed. 751; *Union Mut. Life Ins. Co. v. Payne*, 105 Fed. 172.

d. **Presumption of Natural Death, What Sufficient to Overcome.** The presumption against death by suicide is overcome, however, by proof of circumstances pointing to, and consistent with, the theory of suicide, and inconsistent with any other reasonable theory, particularly where all the reasonable probabilities are in favor of suicide: *Agen v. Metropolitan Life Ins. Co.*, 105 Wis. 217, 76 Am. St. Rep. 905, 80 N. W. 1020; *Dennis v. Mutual Life Ins. Co.*, 84 Cal. 570, 24 Pac. 120.

## II. Effect When Suicide is not Stipulated Against in Policy.

a. **Rule in State Courts.**—It is a rule of almost universal application in the state courts that if a policy of life insurance contains no provision, stipulation, or condition as to suicide, the policy does not, if the insured commits suicide while sane, become void as against the beneficiary. In such case the suicide of one whose life is insured constitutes no defense to an action on the policy of insurance, unless it comes within some condition of the contract of insurance relieving the insurer from liability: *Darrow v. Family Fund Soc.*, 116 N. Y. 537, 15 Am. St. Rep. 430, 22 N. E. 1093; *Fitch v. American Popular Life Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *Morris v. State Mutual Life Ins. Co.*, 183 Pa. St. 563, 39 Atl. 52; *Seiler v. Economic Life Assn.*, 105 Iowa, 87, 74 N. W. 941; *Kerr v. Minnesota Mut. Benefit Assn.*, 39 Minn. 174, 12 Am. St. Rep. 631, 39 N. W. 312; *Patterson v. National Premium Ins. Co.*, 100 Wis. 118, 69 Am. St. Rep. 899, 75 N. W. 980; *Grand Lodge of Mutual Aid v. Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; *Toomey v. Supreme Lodge Knights of Pythias*, 147 Mo. 129, 48 S. W. 936; *Mills v. Rebstock*, 29 Minn. 380, 13 N. W. 162; *Parker v. Des Moines Life Assn.*, 108 Iowa, 117, 78 N. W. 826; *Patrick v. Excelsior Life Ins. Co.*, 4 Hun, 263; 67 Barb. 202; *Supreme Lodge Knights of Pythias v. Trebbe*, 74 Ill. App. 545.

The rule is stated in *Supreme Lodge Knights of Pythias v. Kutscher*, 72 Ill. App. 462, to be that where a policy of life insurance contains no provision making suicide or self-destruction by the assured a forfeiture of the policy, and makes the indemnity under it payable to some one other than the insured or his personal representative, then intentional self-destruction while he is sane does not avoid the policy, but if such policy is by its terms payable to the assured or his personal representative, then intentional self-destruction while sane avoids the policy.

An Alabama case has gone so far as to hold that a clause in a policy of life insurance, providing for a forfeiture in the event

the assured should, while sane, take his own life, is the mere declaration or expression of an implication of the law, as such an event would operate as a forfeiture in the absence of an express provision in the policy to that effect; *Supreme Commandery Knights of Golden Rule v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332.

**b. Doctrine of National Courts.**—The national courts are committed to the doctrine that the personal representatives of one who when sane, deliberately and intentionally kills himself cannot recover the insurance money on his life, though the policy contains no provisions respecting suicide: *Ritter v. Mutual Life Ins. Co.*, 69 Fed. 505, 70 Fed. 954, 169 U. S. 139, 18 Sup. Ct. Rep. 300. The supreme court of the United States has recently decided that it is not contemplated by a policy taken out by a person on his life and stipulating for the payment of a sum named to his personal representatives, that the insurer should be liable if his death is intentionally caused by himself while in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of insurance, the life of the insured, shall not be intentionally and directly, with whatever motive, destroyed by him while sane, and to hold otherwise is to decide that the happening of the event upon which the insurer undertakes to pay, was intended to be left to the option of the insured. This view is opposed to the very essence of the contract: *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. Rep. 330.

This rule has recently been extended so as to include the beneficiary of the suicide. Thus, in *Hopkins v. Northwestern Life Ins. Co.*, 94 Fed. 729, it was held that if not expressed it is implied in every life insurance policy that the insured will not die by his own willful and deliberate act. Hence, if he does so die, his life is terminated by a risk not insured against, and the fact that the beneficiary named is a third person does not enlarge the scope of the contract, nor authorize a recovery thereon in case the insured commits suicide while sane.

### III. Accidental Self-killing or Unintentional Death.

**a. General Rule.**—A condition in a life insurance policy that it shall be void if the insured shall die from "self-destruction," or "by his own hand or act," or like expression, even when the words "sane or insane" are added, has no application where the insured kills himself by accident. Such conditions apply and are a defense only when the self-killing of the insured is intentional: *Michigan Mutual Life Ins. Co. v. Naugle*, 130 Ind. 79, 29 N. E. 393; *Union Mut. Life Ins. Co. v. Payne*, 105 Fed. 172; *Edwards v. Travelers' Life Ins. Co.*, 20 Fed. 661; *Keels v. Mutual etc. Life Assn.*, 29 Fed. 198; *Phillips v. Louisiana Equitable Life Ins. Co.*, 26 La. Ann. 404, 21 Am. Rep. 549.

**b. Death Due to the Negligence of the Insured.**—The words of such conditions do not include cases of unintentional and acci-

dental death, though brought about by acts of the deceased involving negligence or carelessness: *Pierce v. Travelers' Life Ins. Co.*, 34 Wis. 389. "Contracts of insurance, like other contracts, are interpreted so as to meet and satisfy the intention of the parties. Whatever may be the phrase employed expressive of self-destruction, which is to operate as a forfeiture, if not otherwise qualified or limited, whether it be 'commit suicide,' or 'death by suicide,' or 'death by his own act,' or other equivalent expression, it would be most unreasonable to interpret it as including death by accident, or by mistake, though the direct, immediate act of the assured may have contributed to it. The firing of a weapon not supposed to be loaded, or its discharge not directed against, or intended to reach, the person, may cause death. Poison may be taken instead of a curative medicine, by accident or mistake, and the accidents and mistakes from which death may result are innumerable. An extinction of life, unintentional, involuntary, will not fall within such expressions, intended to guard the insurer against the positive, intentional acts of the insured": *Supreme Commandery Knights of the Golden Rule v. Ainsworth*, 71 Ala. 448, 46 Am. Rep. 332. Such condition will not relieve the insurer from payment upon the death of the insured resulting from accidental drowning, although the drowning may be the direct result of the unintentional acts of the insured: *Grand Legion Select Knights v. Korneman* (Kan. App.), 63 Pac. 292.

c. **Death from an Excessive Dose of Medicine.**—A life policy is not avoided by the insured innocently taking a fatal overdose of medicine while sane: *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 317, 39 Am. Rep. 660. Nor by his taking an overdose of laudanum by mistake with fatal result: *Mutual Life Ins. Co. v. Laurence*, 8 Ill. App. 488. Even while drunk: *Equitable Life Assur. Soc. v. Paterson*, 41 Ga. 388, 5 Am. Rep. 535. Or where death ensues from an overdraft of whisky taken without intent to destroy life by an insured who has become physically and mentally weak by causes beyond his control: *Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212, 55 Am. Rep. 192, 4 N. E. 582.

#### IV. Conditions Against Death in Violation of Law.

A condition in a policy of life insurance that the insurer shall not be answerable if the death of the insured was "in violation of, or an attempt to violate, any criminal law," does not avoid a policy, nor constitute a defense, because the death of the insured results from his suicide, unless suicide is a crime in the place where it is committed: *Patterson v. National Premium Mut. Life Ins. Co.*, 100 Wis. 118, 69 Am. St. Rep. 899, 75 N. W. 980; *Darrow v. Family Fund Soc.*, 116 N. Y. 537, 15 Am. St. Rep. 430, 22 N. E. 1093; *Mcacham v. New York State Mut. Ben. Assn.*, 120 N. Y. 237, 24 N. E. 283; *Patrick v. Excelsior Life Ins. Co.*, 4 Hun, 263; *Freeman v. National Ben. Soc.*, 42 Hun, 252. Under such a policy it was held



in *Kerr v. Minnesota etc. Assn.*, 39 Minn. 174, 12 Am. St. Rep. 631, 39 N. W. 312, that suicide committed by an alleged fugitive from justice, to avoid arrest, and trial for a crime committed by him, is not to be considered the proximate result of the alleged crime, and that his death by suicide is not within the proper meaning of the policy, to be considered as the violation of law therein referred to. "Suicide, though strictly a crime, is not reckoned among offenses or violations of law, such as the language of the policy would be commonly understood to refer to": *Kerr v. Minnesota etc. Assn.*, 39 Minn. 174, 12 Am. St. Rep. 631, 39 N. W. 312. "Inasmuch as suicide is not a violation of the criminal law, the words do not necessarily or clearly import that the act which produces it is within the provision in question, or that it was within the intention of the defendant, and that is a sufficient reason why they should not be extended, or their meaning refined by interpretation, with a view to treat the act causing death as within the invalidating condition of the policy": *Darrow v. Family Fund Soc.*, 116 N. Y. 537, 15 Am. St. Rep. 435, 22 N. E. 1093.

**v. Conditions Against Death by "His Own Act or Hand," or "Self-inflicted Injury."**

**a. Suicide While Sane.**—Many life insurance policies contain a proviso that in case the insured shall die "by his own hand or act," or from "self-inflicted injuries," the policy shall be void. Such provisions are intended to, and do, include suicide by the assured, and under policies containing such conditions the suicide of the insured may be set up as a defense. It seems to be also well settled that such a clause in a policy of life insurance is a complete protection to the insurer, in case of voluntary and intentional self-destruction by the assured while sane, or in such condition of mind as to fully comprehend the nature and effect of his act: *Weber v. Home Ben. Soc.*, 21 Ind. App. 345, 52 N. E. 462; *Mutual Life Ins. Co. v. Wiswell*, 56 Kan. 765, 44 Pac. 996; *Moore v. Connecticut etc. Ins. Co.*, 1 Flipp. 363, Fed. Cas. No. 9755; *Supreme Commandery etc. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Phillips v. Louisiana etc. Ins. Co.*, 26 La. Ann. 404, 21 Am. Rep. 549; *St. Louis etc. Ins. Co. v. Graves*, 6 Bush, 268; *Blackstone v. Standard Life Ins. Co.*, 74 Mich. 592, 42 N. W. 156; *Fowler v. Mutual Life Ins. Co.*, 4 Lans. 202; *Weed v. Mutual etc. Ins. Co.*, 9 Jones & S. 476; *Backmeyer v. Mutual etc. Life Assn.*, 82 Wis. 255, 52 N. W. 101.

**b. Degree of Insanity.**—In *Van Zandt v. Mutual etc. Ins. Co.*, 55 N. Y. 169, 14 Am. Rep. 215, the law is stated to be that under a policy containing such a provision, there can be no recovery if the assured deliberately and intentionally takes his own life, and that in order to justify a recovery he must be insane to such a degree as to render him unconscious that the act he does will cause his death, or he must commit it under the influence of some insane impulse which he cannot resist in order to take the case out of the

proviso. "When nothing is said in the policy with respect to insanity, the words 'die by his own hand,' in their literal sense, comprehend all cases of self-destruction. The exceptions which have been engrafted upon these words by judicial decisions must rest upon the ground that the excepted cases could not have been within the meaning of the parties to the policy. The intent on the part of the insurer in inserting the condition is evident. The policy creates in the insured a pecuniary interest in his own life. To a man laboring under the pressure of poverty and the urgent wants of a dependent family, or of inability to discharge sacred pecuniary obligations, or other similar causes, the policy offers a temptation to self-destruction. To protect the insurers against increase of risk arising out of this temptation is the object for which the condition in question is inserted. The condition ought, therefore, to be so construed as to exclude only those cases in which these motives could not have operated, such as accident or delirium. So far as considerations of public policy are concerned, or have any place in determining such a question, they are undoubtedly in favor of confining the exception to the conditions to cases in which the self-destruction is clearly shown to have been accidental or involuntary. . . . I do not find that any of the cases have gone so far as to adjudicate that the mere want of capacity to appreciate the moral wrong involved in the act, where it was voluntary and intentional, unaccompanied by any want of appreciation of its physical nature and consequences, or want of power of will or self-control, is sufficient to take the case out of the proviso. Supposing a man to be in possession of his will and of the ordinary mental faculties necessary for self-preservation, but that his mind has become so morbidly diseased on the subject of suicide that he cannot appreciate its moral wrong, and in this condition of mind he takes his own life, voluntarily and intentionally, perhaps with the very object of securing to his family the benefits of an insurance upon his life, it is difficult to say that this is not a death by his own hand within the meaning of the policy": *Van Zandt v. Mutual Ben. Life Ins. Co.*, 55 N. Y. 169, 14 Am. Rep. 220, 221.

Suicide committed by a person who understands the nature of the act and intends to take his own life avoids a policy of life insurance, providing that it shall be void if the insured shall die by his own hand: *Dean v. American Mutual Life Ins. Co.*, 4 Allen, 96. And if the insured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery: *Life Ins. Co. v. Terry*, 15 Wall. 580; *Insurance Co. v. Rodel*, 95 U. S. 232-241. If the insured dies by an act of self-killing by shooting himself with a pistol, the insurer is not liable if the insured was conscious of the act he was committing, intended to take his life, and was capable of understanding the nature and consequences of his act, whether

or not he was capable of understanding its moral aspects or of distinguishing between right and wrong: *Gay v. Union Mutual Life Ins. Co.*, 9 Blatchf. 142, Fed. Cas. No. 5282.

## VI. Insanity as Affecting Defense of Suicide.

**a. Intentional Self-killing.**—The broad statement has been made that if a policy of life insurance contains no provision on the subject, the death of the insured "by his own act" resulting from insanity is as much insured against as death resulting from any other physical affliction: *Grand Lodge etc. Mut. Aid v. Wleting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59. The above statement, we think, is not sustained by the authorities. It is true that some cases do hold that a life insurance policy conditioned as void in case the insured dies by his own hand does not extend to a case where the insured commits suicide while insane, without discussing to any considerable extent, or deciding the degree of insanity necessary to avoid a recovery under such a provision, when the insured dies from suicide: *Scheffer v. National Life Ins. Co.*, 25 Minn. 534; *Eastabrook v. Union etc. Ins. Co.*, 54 Me. 224, 89 Am. Dec. 743; *John Hancock etc. Ins. Co. v. Moore*, 34 Mich. 41; *Breasted v. Farmers' etc. Co.*, 8 N. Y. 299, 59 Am. Dec. 482; *Phillips v. Louisiana etc. Ins. Co.*, 26 La. 404, 21 Am. Rep. 549; *Blackstone v. Standard Life etc. Ins. Co.*, 74 Mich. 592, 42 N. W. 156.

"Death by his own hands, in the case of one non compos is as much the result of disease as death by fever or consumption": *John Hancock etc. Ins. Co. v. Moore*, 34 Mich. 46. Other cases hold that a life insurance policy conditioned to be void if the insured shall die from suicide is not avoided by the self-destruction of the assured when insane, although he meant to kill himself and knew that death would result from his acts: *Connecticut etc. Ins. Co. v. Groom*, 86 Pa. St. 92, 27 Am. Rep. 689; *Schultz v. Insurance Co.*, 40 Ohio St. 217, 48 Am. Rep. 676.

One court has gone so far as to hold that a clause in a policy of life insurance which excepts from the risks assumed the death of the assured by his own hand, operates irrespectively of the condition of mind of the insured respecting his moral and legal responsibility, and is intended to protect the insurer from any act of the insured, even if insane: *Nimick v. Mutual Ben. etc. Ins. Co.*, 3 Brewst. 502. In *Cooper v. Massachusetts etc. Ins. Co.*, 102 Mass. 227, 3 Am. Rep. 451, it was held that under a provision in the policy that it should be void if the assured "shall die by suicide," and he hanged himself with a rope, there could be no recovery in the absence of proof that the act was involuntary, although the act of self-destruction was committed under the influence of insanity.

**b. Inability to Understand Moral Character of Act and Irresistible Insane Impulse.**—Undoubtedly, the prevailing rule is that announced by the supreme court of the United States in *Connecticut Life Ins. Co. v. Akens*, 150 U. S. 473, 14 Sup. Ct. Rep. 155,



"that if one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity, that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence, and effect, it is not a 'suicide' or 'self-destruction,' or dying by his own hand, within the meaning of those words in a clause excepting such risks out of the policy, and containing no further words expressly extending the exemption to such a case: *Life Ins. Co. v. Terry*, 15 Wall. 580; *Bigelow v. Berkshire Ins. Co.*, 93 U. S. 284; *Insurance Co. v. Rodel*, 95 U. S. 232; *Manhattan Ins. Co. v. Broughton*, 109 U. S. 121, 3 Sup. Ct. Rep. 99; *Connecticut etc. Ins. Co. v. Lathrop*, 111 U. S. 612, 4 Sup. Ct. Rep. 533; *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. Rep. 685." This rule was first announced in *Life Ins. Co. v. Terry*, 15 Wall. 580, and in its substance or equivalent it has been adopted and followed in nearly all of the states of the Union, as well as in the national courts. Thus, in *Waters v. Connecticut Mutual Life Ins. Co.*, 2 Fed. 892, it was held that within such a clause in the policy, although the insured killed himself, the policy is not avoided if he was impelled thereto by an insane impulse which he had no power to resist, or committed the act without knowledge, at the time, of its moral character and its consequences and effects.

Several late cases in the national courts hold that suicide of the insured is not a breach of a warranty in his application or the policy that he will not die by his own hand, if, at the time of taking his life, his reasoning faculties are so far impaired that he is not able to understand the moral character, general nature, consequences, and effect of his act, or when he is impelled thereto by an insane impulse which he has no power to resist: *Travelers' Ins. Co. v. Mellick*, 65 Fed. 178; *Mutual Life Ins. Co. v. Leubrie*, 71 Fed. 843. In *Ritter v. Mutual Life Ins. Co.*, 69 Fed. 505, affirmed, 169 U. S. 139, 18 Sup. Ct. Rep. 300, it was held that if the insured kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequences, and effect, his self-destruction will not of itself prevent recovery under such a policy. But by capacity to understand the moral character of his act is to be understood a capacity to understand what he was doing, and the consequences thereof to himself, his character, his family, and others, and to comprehend the wrongfulness of the act, as a sane man would.

Among the state cases adopting the rule last mentioned may be noted that of *Michigan etc. Ins. Co. v. Naugle*, 130 Ind. 79, 29 N. E. 393, in which it was decided that such a condition does not apply if the insured takes his life while of unsound mind, if his mind is so impaired by disease that he does not comprehend the moral character of his act, though he may have sufficient mental capacity to know the physical consequences of the deed. In *Knickerbocker*

**L. Ins. Co. v. Peters**, 42 Md. 414, it was held that such a proviso does not prevent recovery if the insured killed himself in a fit of insanity which overpowered his consciousness, reason, and will. If the insured, although aware that a certain act will terminate his life, yet does the act under an insane impulse, caused by disease and derangement of intellect, depriving him of capacity to govern his own conduct in accordance with reason, the act cannot be regarded as voluntary, nor within the provision of a policy of life insurance avoiding it, in case the insured shall die by his own hand: **Newton v. Mutual Ben. L. Ins. Co.**, 76 N. Y. 426, 32 Am. Rep. 335. The same rule in effect is announced in **American Life Ins. Co. v. Isett**, 74 Pa. St. 176. If such conditions exist, insanity, short of delirium or frenzy will excuse the act of suicide, and prevent the avoidance of the policy containing a provision against the insured committing suicide: **Hathaway v. National etc. Ins. Co.**, 48 Vt. 335. The policy is not avoided if, at the time of the act of self-killing, the mental condition of the insured is such as to render him incapable of distinguishing right from wrong to such extent as to render him legally and morally irresponsible for his acts and conduct: **Merritt v. Cotton States etc. Ins. Co.**, 55 Ga. 103. And an act of self-destruction by an insured who is insane at the time, without fault on his part, is not suicide within such a proviso in the policy, if the insanity is of such character and degree as to free the act of all immorality and leave the actor blameless: **Life Assn. v. Waller**, 57 Ga. 533. In **Van Zandt v. Mutual Ben. etc. Ins. Co.**, 55 N. Y. 169, 14 Am. Rep. 215, it was held that the insured must be insane to such a degree as to render him unconscious that the act he does will cause his death, or he must commit it under some insane impulse which he cannot resist, in order to take the case out of the proviso against death by his own hands. If the suicide is committed while the insured is so insane as to be incapable of distinguishing between right and wrong, the policy is not avoided: **Phadenhauer v. Germania etc. Ins. Co.**, 7 Heisk. 567, 19 Am. Rep. 623. Or if he is unable from insanity to understand the consequences and effect of his act or is impelled thereto by an irresistible insane impulse, the policy is not avoided: **Mutual etc. Ins. Co. v. Walden** (Tex. Civ. App.), 26 S. W. 1012; **New Home Assn. v. Hagler**, 29 Ill. App. 437; **Suppliger v. Covenant etc. Assn.**, 20 Ill. App. 595; **Hammers v. Supreme Tent of Maccabees**, 78 Ill. App. 162; **Grand Lodge of Mutual Aid v. Wieting**, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; **Mutual Life Ins. Co. v. Daviess**, 87 Ky. 541, 9 S. W. 812. Even though he intends the result of the act to be fatal: **New Home Assn. v. Hagler**, 29 Ill. App. 437.

In discussing this question in **Blackstone v. Standard Life etc. Ins. Co.**, 74 Mich. 592-605, 42 N. W. 156, Mr. Justice Long said: "Upon the question of voluntary suicide, intentionally committed by a sane man in the possession of his faculties, knowing how to adapt means to ends, and conscious of the immorality of the act,

there is no difference of opinion, and all of the authorities agree that such self-destruction is within the exemption. But whether suicide by an insane man is also within the exemption has been the question in dispute, and upon this two prominent and different doctrines have been maintained. On the one hand it is maintained that if the act be voluntarily done in pursuance of an intelligent purpose, and intentionally and intelligently carried out by the proper adaptation of means to ends, it is suicide on the part of the insured, or death by his own hands, although insanity exists to such an extent that he may not be able to appreciate the moral qualities of the act. On the other hand, it is maintained that however intelligently the act may be done, if at the time the will be overpowered by an uncontrollable impulse, or the party be unable to appreciate the moral character of the act, it is not within the meaning of the provision." The learned judge, after quoting the rule from *Insurance Co. v. Terry*, 15 Wall. 580, that if the death is caused by the voluntary act of the insured, he knowing and intending that his death shall be the result of the act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable, and, citing many cases in support of it, proceeds to say that: "The effect of this doctrine is that, in order to work a forfeiture under such a policy on the ground of self-destruction, the insured must have had sufficient mental capacity not only to understand that the act will destroy his life, but also to distinguish its moral quality and consequences, the right and wrong of it, and must perform the act, not under any uncontrolled impulse resulting from insanity, but voluntarily with the intent to end his life; in other words, that it must be an act done with an evil motive. We think that this doctrine is supported by the great preponderance of authority in this country, and must be conceded to be the prevailing American doctrine, and it seems to us to be the safer and more reasonable and more consistent doctrine. It agrees with the general rule as to the excusatory feature of insanity in civil as well as in criminal cases. It also operates to prevent forfeitures, which is a favorite principle of an enlightened jurisprudence. Nor can it have any injurious effect, since insurers may always frame such contracts to suit themselves, and may, if they choose, insert express stipulations to the effect that insanity shall not in any case prevent an avoidance by the suicide of the insured": *Blackstone v. Standard Life etc. Ins. Co.*, 74 Mich. 610, 42 N. W. 156.

#### VII. Presumption as to Sanity and Burden of Proof.

Aside from extrinsic facts and circumstances, the law presumes that every person who destroys his life is sane up to the very mo-



ment when he does the act which causes his death. Hence, there is no presumption of law that an insured person who commits suicide, was insane at the time, nor is the fact of the suicide of itself *prima facie* evidence of insanity: *Coffey v. Home Life Ins. Co.*, 44 How. Pr. 481; *Weed v. Mutual Ben. etc. Ins. Co.*, 70 N. Y. 561; *Hopkins v. Northwestern Life Ins. Co.*, 94 Fed. 729; *Merritt v. Cotton States etc. Ins. Co.*, 55 Ga. 103; *Knickerbocker Life Ins. Co. v. Peters*, 42 Md. 414. The party alleging suicide must prove it, and the mere fact of death in an unknown manner, and that the body was found without any marks of violence upon it, does not create a legal presumption of suicide: *Continental Ins. Co. v. Delpeuch*, 82 Pa. St. 226. Although the act of self-destruction raises no presumption of insanity, yet such act, and the mode and manner of its accomplishment, may be considered together, with all the facts and circumstances, in determining the question of the insanity of the deceased: *Grand Lodge Order of Mutual Aid v. Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; *Ritter v. Mutual Life Ins. Co.*, 69 Fed. 505. Therefore, if the policy of life insurance contains a clause declaring it void in case the insured dies by his own hand, or a similar expression, and he commits suicide, the burden of proof is upon the party seeking to enforce the policy to prove that the self-destruction was not the conscious, voluntary act of one responsible for his actions, but the involuntary act of an insane person: *Weed v. Mutual Ben. etc. Ins. Co.*, 70 N. Y. 561; *Nelson v. Equitable Life Ins. Co.*, 73 Ill. App. 134; *Phadenhauer v. Germania etc. Ins. Co.*, 7 Heisk. 567, 19 Am. Rep. 623; *Hiatt v. Mutual Life Ins. Co.*, 2 Dill. 572, Fed. Cas. No. 6449a.

If the fact of self-killing is conceded, it is for the person claiming to recover on the policy to establish that the subject insured was in mental condition when he committed the act, which left the insurer liable: *Gay v. Mutual etc. Ins. Co.*, 9 Blatchf. 142, Fed. Cas. No. 5282; *Ritter v. Mutual etc. Ins. Co.*, 69 Fed. 505.

### VIII. Suicide, "Sane or Insane."

**a. Generally, no Recovery Can be Had.**—It is competent for persons, in contracting as to life insurance, to provide that self-destruction by the insured, whether "sane or insane," shall avoid the contract. Such a stipulation is everywhere considered valid and binding: *Hart v. Modern Woodmen*, 60 Kan. 678, 72 Am. St. Rep. 380, 57 Pac. 936; *Chapman v. Republic etc. Ins. Co.*, 6 Biss. 239, Fed. Cas. No. 2606; *Bigelow v. Berkshire etc. Ins. Co.*, 93 U. S. 284; *De Gogorza v. Knickerbocker etc. Ins. Co.*, 65 N. Y. 232. Unless the insertion of such a stipulation in the contract is absolutely prohibited by statute, as it is in the state of Missouri: *Berry v. Knights Templar etc. Co.*, 46 Fed. 439; *Knights Templar etc. Co. v. Berry*, 50 Fed. 511; *Toomey v. Supreme Lodge Knights of Pythias*, 147 Mo. 129, 48 S. W. 936; *Keller v. Travelers' Ins. Co.*, 58 Mo. App. 557.

In *Hart v. Modern Workmen*, 60 Kan. 682, 57 Pac. 936, 72 Am. St. Rep. 380, the court, in discussing this question, said: "To avoid disputes as to the meaning of 'suicide,' and definitely to fix the extent of the risk, it is not uncommon to incorporate a condition in an insurance contract that it shall be void if the insured die by suicide, sane or insane. No reason is seen why a stipulation exempting the insurer from liability for acts of the insured committed while insane should not be enforced. It does not contravene sound morals or public policy, and courts must enforce the intention of the parties as expressed by it. As to the right of insurance companies to include such an exemption in the policy, it has been said that if 'they are at liberty to stipulate against hazardous occupations, unhealthy climate, or death by the hands of the law, or in consequence of injuries received when intoxicated, surely it is competent for them to stipulate against intentional self-destruction, whether it be the voluntary act of an accountable moral agent or not.'

"As to the effect of the words 'sane or insane' added to the condition, the same authority said: 'Nothing can be clearer than that the words 'sane or insane' were introduced for the purpose of excepting from the operation of the policy any intended self-destruction whether the insured was of sound mind or in a state of insanity. These words have a precise, definite, well-understood meaning. No one can be misled by them, nor could an expansion of this language more clearly express the intention of the parties. In the popular, as well as in the legal, sense, suicide means, as we have seen, the death of a party by his own voluntary act, and this condition, based as it is on the construction of this language, informed the holder of the policy that if he purposely destroyed his life the company would be relieved from liability: *Bigelow v. Berkshire etc. Ins. Co.*, 93 U. S. 284. Such a condition does not admit of an interpretation to include death by accident or mistake, although it may have resulted from the immediate act of the insured, but under such an exception as we are considering, if the insured purposely takes his own life, the insurer goes free: *Pierce v. Travelers' etc. Ins. Co.*, 34 Wis. 389; *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 241; *Scarth v. Security etc. Ins. Soc.*, 75 Iowa, 346, 39 N. W. 658; *Billings v. Accident Ins. Co.*, 64 Vt. 78, 33 Am. St. Rep. 913, 24 Atl. 656; *Streeter v. Western etc. Ins. Soc.*, 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779; *Salentine v. Mutual Ben. Life Ins. Co.*, 24 Fed. 161; *Union Central Life Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. Rep. 1360; *Riley v. Hartford Life etc. Co.*, 25 Fed. 316; *Sabin v. National Union*, 90 Mich. 177, 51 N. W. 202"; *Hart v. Modern Workmen*, 60 Kan. 683, 72 Am. St. Rep. 380, 57 Pac. 936.

"In interpreting such an exception, a distinction has been made by some of the authorities between cases of insanity where the suicide was conscious of the physical nature and result of the act

which causes his death, and cases where he did not appreciate the physical consequences of such act": *Hart v. Modern Workmen*, 60 Kan. 683, 72 Am. St. Rep. 380, 57 Pac. 936. If any ground for such a distinction exists, it is not worthy of any considerable consideration, because the great weight of authority establishes the rule beyond doubt that a provision in a life insurance policy that suicide by the insured, whether sane or insane, shall avoid it, is valid, and covers the case of one who intentionally commits self-destruction, understanding the physical nature and consequences of the act, although not conscious of its moral quality or consequences: *Hart v. Modern Workmen*, 60 Kan. 679, 72 Am. St. Rep. 380, 57 Pac. 936; *Pierce v. Travelers' Ins. Co.*, 34 Wis. 389; *Kelly v. Mutual Life Ins. Co.*, 75 Fed. 637; *Union Central Life Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277; *Adkins v. Columbia Life Ins. Co.*, 70 Mo. 27, 35 Am. Rep. 410; *Starck v. Union Central Life Ins. Co.*, 134 Pa. St. 45, 19 Am. St. Rep. 674, 19 Atl. 703; *Weld v. Mutual Life Ins. Co.*, 61 Ill. App. 187; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. Rep. 1360; *Nelson v. Equitable Life Soc.*, 73 Ill. App. 133; *Riley v. Hartford Life Ins. Co.*, 25 Fed. 315; *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 285-287.

**b. If Unconscious of Effect of Act.**—In *Streeter v. Western Ins. Co.*, 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779, it was held that an insurance policy containing such a provision was avoided if the insured committed suicide while insane, unless his insanity was such that he did not know that his act was done for the purpose of self-destruction. It is immaterial that he had no conception of the wrong involved in its commission. This ruling was followed and approved in *Sabin v. Senate of National Union*, 90 Mich. 177, 51 N. W. 202, where it was held that one who has sufficient intelligence to employ a rope, adjust it, and commit suicide by hanging, cannot be said to be so unconscious of the natural physical result of his acts as to prevent the operation of a law of a benefit association prohibiting the payment of any benefit upon the death of a member who commits suicide, whether sane or insane, at the time of its commission.

In *Parish v. Mutual Ben. Life Ins. Co.*, 19 Tex. Civ. App. 457, 49 S. W. 153, it was held that a contract of insurance containing such a stipulation is forfeited if the insured dies from wounds self-inflicted while confined in jail on a criminal charge, where it is not shown that he was unconscious of his acts, or that they were involuntary or not aimed at self-destruction.

Quite a large number of cases hold that if a policy of life insurance provides that it shall become void if the assured shall die by his own hand, whether sane or insane, the insurer is in no case liable if the insured commits suicide, and it is immaterial what his mental condition was at the time of his death, as the liability of the insurer is not affected by the degree of insanity, and is not



liable if the insured kills himself while insane: *Spruill v. Northwestern Mutual etc. Ins. Co.*, 120 N. C. 141, 27 S. E. 39; *Tritschler v. Keystone Mut. Ben. Assn.*, 180 Pa. St. 205, 36 Atl. 734; *Sargeant v. National Life Ins. Co.*, 189 Pa. St. 341, 41 Atl. 351; *Sparks v. Knight Templars etc. Assn.*, 61 Mo. App. 109; *Brower v. Supreme Lodge etc. Assn.*, 74 Mo. App. 490; *Haynie v. Knights Templar etc. Co.*, 139 Mo. 416, 41 S. W. 461.

If the insured commits suicide while temporarily insane from illness, and when he is in no manner conscious or responsible for his act, there can be no recovery on such a policy according to the holding in *Scarth v. Security Mut. Life Co.*, 75 Iowa, 346, 39 N. W. 658. And in *Billings v. Accident Ins. Co.*, 64 Vt. 78, 33 Am. St. Rep. 913, 24 Atl. 656, it was held that when the policy contained such a stipulation there can be no recovery if the insured takes his own life, though at the time he did so he was in such an insane condition that he was incapable of understanding the physical nature and consequences of his act and did not know that by it he would take his own life.

c. **If Utterly Bereft of Reason or Totally Insane.**—It has also been held that if the insured takes his own life, although at the time utterly bereft of reason, the policy is avoided under a stipulation against suicide, sane or insane: *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 232; and in such case no degree of insanity will avoid the condition: *Chapman v. Republic Life Ins. Co.*, 6 Biss. 238, Fed. Cas. No. 2606; *Haynie v. Knights Templar etc. Co.*, 139 Mo. 416, 41 S. W. 461.

Suicide cannot be regarded as death by accident or from accidental causes under such a policy, from the fact that it was committed while the insured was insane and the insanity was produced or accelerated by an accidental fall or injury: *Sheeter v. Western Ins. Co.*, 65 Mich. 199, 8 Am. St. Rep. 882, 31 S. W. 779.

#### IX. Effect of By-laws of Mutual Benefit Societies.

A fraternal benefit association may provide either in its certificate of membership or in its by-laws that it shall not be liable for benefits in the nature of life insurance on the death of a member by suicide. In such a case the insurance is governed by the rules applicable to any other sort of insurance: *Theobal v. Supreme Lodge Knights of Pythias*, 59 Mo. App. 87; *McCoy v. Northwestern Mutual etc. Assn.*, 92 Wis. 577, 66 N. W. 697; *Sabin v. Senate of National Union*, 90 Mich. 177, 51 N. W. 202; *Cotter v. Royal Neighbors*, 76 Minn. 518, 79 N. W. 542.

a. **Effect on Members of Laws Subsequently Passed.**—Generally speaking, a benefit society may enact a by-law providing that the benefit shall be forfeited if the member "take his own life," or "die from suicide, sane or insane," which will bind all members irrespective of the time when they become such, whether before or after the enactment of such by-law, provided the certificate or

by-laws stipulate that the member shall comply with all of the laws of the order then in force or those which may be subsequently enacted: *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Supreme Lodge Knights of Pythias v. La Malta*, 95 Tenn. 157, 31 S. W. 493; *Supreme Lodge Knights of Pythias v. Kutscher*, 72 Ill. App. 462; *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203, 55 Am. St. Rep. 310, 20 South. 712. But such an association cannot, without the assent of such member, impose any new condition affecting the contract to his injury. It cannot, by a subsequent by-law, to which he does not assent, forfeit any of his rights, such as exempting the defendant from liability in case of the suicide of members: *Northwestern Benefit etc. Assn. v. Wanner*, 24 Ill. App. 357; *Supreme Lodge etc. v. Stein*, 75 Miss. 107, 65 Am. St. Rep. 589, 21 South. 559.

b. **Right of Board of Control to Add New Regulation.**—A provision in the constitution of a benevolent association having a life insurance department that its board of control shall have entire charge and full control of the endowment rank, subject to such restrictions as the supreme lodge may provide, does not authorize the board of control to pass a regulation providing that no member who commits suicide shall be entitled to benefits: *Supreme Lodge etc. v. La Malta*, 95 Tenn. 157, 31 S. W. 493; *Supreme Lodge etc. v. Kutscher*, 62 Ill. App. 462.

#### **X. Effect of Incontestable Clause in Policy.**

Although an application for life insurance stipulates that the insurer shall not assume liability for the death of the insured by his own hand, yet if the policy declares that, subject to the stipulations requiring the payment of premiums on extrahazardous occupations, a claim under the policy by death occurring more than two years after its date shall be incontestable except for fraud in obtaining the policy, the insurer is liable for the death of the insured by his own hand occurring more than two years after the issuing the policy: *Goodwin v. Provident etc. Assn.*, 97 Iowa, 226, 59 Am. St. Rep. 411, 66 N. W. 157. To the same effect is *Patterson v. Natural Premium Mutual etc. Ins. Co.*, 100 Wis. 118, 69 Am. St. Rep. 899, 75 N. W. 980, where the policy provided that it should be absolutely incontestable from the date of its delivery and acceptance except for the nonpayment of premiums or misstatements of age. In line with these decisions is that in *Simpson v. Life Ins. Co.*, 115 N. C. 393, 20 S. E. 517. So if the policy provides that the insurer does not assume the risk of the death of the insured by his own hand, sane or insane, but that such condition may be waived in writing, and then provides that after five years from date the policy shall be incontestable from any cause except nonpayment of dues or mortuary assessments if the age of the applicant is correctly stated, the company is liable for the full amount of the policy, if the insured commits suicide or dies by his own hand more than five years after

the policy is issued, provided the insured has stated his age correctly, and all dues and assessments have been paid up to the time of his death: *Mareck v. Mutual etc. Assn.*, 62 Minn. 39, 54 Am. St. Rep. 613, 64 N. W. 68. If the policy provides that if it shall be in force for five years, it shall thereafter be incontestable from any cause except for nonpayment of dues, but also provides that if the insured shall die by his own hand, whether voluntary or involuntary, sane or insane, the company shall not be liable, the suicide of the insured after the policy has been in force for five years does not relieve the insurance company from liability: *Mutual Reserve Fund etc. Assn. v. Payne* (Tex. Civ. App.), 32 S. W. 1063.

#### **XI. Effect of Intent to Suicide When Taking Out Policy.**

A preconceived secret intent on the part of the insured at the time of taking out a policy on his life to commit suicide vitiates the policy when the death results therefrom, even as against the beneficiary named therein, although there is no provision in the policy for forfeiture in case of suicide: *Parker v. Des Moines Life Assn.*, 108 Iowa, 117, 78 N. W. 826; *Smith v. National Ben. Soc.*, 51 Hun, 575, 4 N. Y. Supp. 521. And when the defense is set up that the insurance was taken out with deliberate intent on the part of the insured to commit suicide for the purpose of procuring the insurance money, proof of suicide in such manner as to indicate it was the culmination of a deliberately conceived purpose to defraud is competent and necessary to the defense, although under the terms of the policy death by suicide is not made a ground of defense: *Smith v. National Ben. Soc.*, 123 N. Y. 85, 25 N. E. 197, affirming, same case, 51 Hun, 575, 4 N. Y. Supp. 521. Under the Missouri statute (Mo. Rev. Stats. 1899, secs. 5855, 7896), suicide is made a defense to the payment of the policy if the insured contemplated or intended to commit suicide at the time he made application for the policy, although under the statute in the absence of such intent suicide is no defense, notwithstanding any stipulation in the policy to the contrary: *Christian v. Connecticut etc. Ins. Co.*, 143 Mo. 460, 45 S. W. 268; *Toomey v. Supreme Lodge etc.*, 147 Mo. 129, 48 S. W. 936.

#### **XII. Conflict of Laws—Policy Taken Out in One State, Death in Another.**

A policy of life insurance which does not become a binding contract until its delivery is governed by the laws of the state where the insured lives, to whom it is there delivered by a resident agent of the company, although it was executed and dated at the company's office in another state. Hence, such policy is governed by a statute of the former state providing that it shall be no defense that the insured committed suicide, unless he contemplated suicide in applying for the policy, any stipulation in the policy to the contrary notwithstanding: *Knights Templar etc. Co. v. Berry*, 50 Fed. 511.



# CASES

IN THE

# SUPREME COURT

OF

# MICHIGAN.

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DAGES v. BRAKE.

[125 Mich. 64, 83 N. W. 1039.]

**JUDICIAL NOTICE—ABBREVIATIONS.**—Courts will take judicial notice of the meaning of abbreviations which are in common use, and have a well-understood meaning among people in general.

**REPLEVIN — WRIT — ABBREVIATIONS — PAROL EVIDENCE.**—Where goods are described in a writ of replevin by abbreviations which have a well-known and settled meaning to the trade, but which are not in such common use as to make them the subjects of judicial notice, parol evidence is admissible to explain their meaning.

**APPEAL—BILL OF EXCEPTIONS—REPLEVIN.**—Where a writ of replevin has been quashed on motion, before issue is joined and without any trial, a bill of exceptions is unnecessary to review the errors upon appeal.

Replevin. Error from an order quashing the writ.

James A. Muir, for the appellants.

William H. Aitkin and John H. Farley, for the appellee.

**64 HOOKER, J.** The plaintiffs' writ of replevin contained the following description of articles constituting the subject of the action, and, with a few slight inaccuracies, the articles described in the affidavit attached to the writ and the declaration were the same:

**65 Num-**

ber.	Pairs.	
29	6 Woman's Dong. Polish	3½ to 6's at \$1.50... \$9 00
681	12 Child's Dong. Pol.	8½ to 12 at .75... 9 00
411	12 pair Misses' Dong. Pol.	12's to 2's at .90... 10 80

And other similar items. A portion of the goods only were taken under the writ, as shown by the inventory. After the declaration was filed, the defendant made a motion to quash the affidavit, writ, declaration, and all proceedings, for the reasons: "1. That the affidavit, writ, and declaration do not describe any goods and chattels; 2. That said writ of replevin does not sufficiently describe the property to be replevied; 3. That said declaration does not describe the property as mentioned in said writ."

The motion does not refer to any affidavit or paper as a basis, but copies of the affidavit, writ, and declaration were attached, and we will therefore assume it to have been based upon the record. We find in the printed record affidavits made by the defendant and his attorney that no other writ or declaration had been served, and we will assume that to be true.

Upon the hearing of this motion the proceedings were quashed. Subsequently, plaintiffs asked the court to vacate the order, and to permit an amendment to the writ and declaration by the insertion of the words, "Footwear, consisting of boots, shoes, and slippers, as follows," immediately before the list. This motion was based upon the files and records and affidavits attached. The latter show that the defendant purchased the articles in question from the plaintiffs, who were shoe dealers, that said purchase was fraudulent, and that defendant received said goods by an invoice which described them in the identical terms used in the writ, and that the defendant aided the sheriff in identifying said goods at the time he took them under the writ. It is also shown that such goods have a settled description known and used by the trade in conformity to <sup>66</sup> said writ. This motion was denied, and the case is before us upon error. The errors assigned are: 1. In rendering judgment for the defendant; 2. In sustaining the motion to quash for the reasons set forth in the motion; 3. In denying the application to amend; 4. In confirming the motion to quash.

There is really but one question in the case, and that is whether the writ and other papers contain a valid description of the property sought to be replevied. We cannot take judicial notice that the words and abbreviations used have a well-understood meaning with those who have to do with such articles. There are abbreviations in such common use that courts take judicial notice of their meaning, and determine it without proof: *Glenn v. Porter*, 72 Ind. 525; *Belford v. Beatty*, 145 Ill. 414, 34 N. E. 254; *Keith v. Sturges*, 51 Ill. 142; *Salisbury v. Shirley*, 66

Cal. 223, 5 Pac. 104; United States Express Co. v. Keefer, 59 Ind. 263; Frazer v. State, 106 Ind. 471, 7 N. E. 203; South Missouri Land Co. v. Jeffries, 40 Mo. App. 360; Moseley v. Mastin, 37 Ala. 216. See Ripley v. Case, 78 Mich. 126, 18 Am. St. Rep. 428, 43 N. W. 1097, where the court took judicial notice that the abbreviation "M. C. R. R." is the recognized name of the Michigan Central Railroad. There are others perhaps none the less certain in their meaning, to those who understand them, than those involved in the cases cited, but which are not in such common use as to make them the subjects of judicial notice, but which, nevertheless, are susceptible of proof, and parol testimony is admissible to explain such meaning: Barry v. Coombe, 1 Pet. 653; United States v. Hardyman, 13 Pet. 176; Shattuck v. People, 5 Ill. 477; Rowley v. Berrian, 12 Ill. 200; Sheldon v. Benham, 4 Hill, 129, 40 Am. Dec. 271; Collender v. Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224; De Lavallette v. Wendt, 75 N. Y. 579, 31 Am. Rep. 494; Barton v. Anderson, 104 Ind. 578, 4 N. E. 420; Hite v. State, 9 Yerg. 357. <sup>67</sup> While it is possible that an alleged description may be void because it does not describe anything, that cannot be said of every description where a court may not understand the meaning of the term used. If it actually does stand for something, and is so known and understood by the parties, it is enough; and this should not be determined and the proceedings quashed upon a preliminary motion, without an opportunity being given to show such fact. Indeed, in such case it may raise a proper question of fact for a jury: Cobbey on Replevin, sec. 554.

It is obvious, therefore, that the question should not have been summarily disposed of on motion. The writ states that "the following goods and chattels," naming them as above, are detained by the defendant. The court should not assume that these abbreviations are not lawful names for such goods and chattels, especially where it can be proved that they have been bought and sold under such names. It is held in many cases that a description is sufficient if it can be made definite by pointing out the property: Cobbey on Replevin, sec. 547; Farwell v. Fox, 18 Mich. 166; Sexton v. McDowd, 38 Mich. 148; Bolton v. Nitz, 88 Mich. 357, 50 N. W. 291. These decisions presuppose an opportunity to make the description definite by proof, and necessarily preclude the quashing of the writ upon preliminary motion in a case plainly susceptible of proof. This is not the first time that such descriptions as these have been



used: See *Reeder v. Moore*, 95 Mich. 594, 55 N. W. 436. In that case, however, the chattels were otherwise designated. It was erroneous for the court to quash this writ upon motion.

Counsel for the appellee offer several technical objections to the consideration of this question, but we think they should not prevail. The first and second assignments of error show that the decision of the motion to quash was complained of, and the record shows that nothing was involved in that motion but the sufficiency of the description (substantially identical in all the papers) upon the face of the record. The case is ruled by *Conely v. Dudley*, <sup>68</sup> 111 Mich. 122, 69 N. W. 151. Error affirmatively appears upon the record.

Again, it is urged that there are no exceptions, and that no bill of exceptions is returned. It is not a case where exceptions and a bill of exceptions are required. There was no trial; not even an issue was joined. The writ brings up the files and journal entries, and if from these error appears it is sufficient.

The judgment is reversed, with costs, and the record will be remanded for further proceedings.

The other justices concurred.

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**Abbreviations.**—Judicial notice will be taken of such ordinary abbreviations as are in common use: *Power v. Bowdle*, 3 N. Dak. 107, 44 Am. St. Rep. 511, 54 N. W. 404; monographic note to *Lan-fear v. Mestier*, 89 Am. Dec. 692. That parol evidence is admissible to explain abbreviations, see *Sheldon v. Benham*, 4 Hill, 129, 40 Am. Dec. 271; *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. Rep. 224.

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## CLARK v. NEEDHAM.

[125 Mich. 84, 83 N. W. 1027.]

**CONTRACTS—RESTRAINT OF TRADE—MONOPOLY.**—A contract in the form of a lease, whereby one manufacturer agrees with another engaged in the same business not to manufacture certain articles during a specified period, is void as against public policy.

**CONTRACTS—GENERAL RESTRAINT OF TRADE—MONOPOLY.**—A contract whereby one agrees to close part of his business for the benefit of a rival is void as tending to create a monopoly, although limited as to time and subject matter.

Assumpsit by plaintiffs against defendants for rent. The parties entered into agreements in the form of leases, whereby the plaintiffs leased to the defendants a portion of their manufac-

turing plant at a stated consideration as rent. The plaintiffs agreed not to manufacture or sell a certain kind of goods except to one party. The defendants were not to use the machinery leased for the purpose of manufacturing this class of goods. Verdict for the defendant, on the ground that the agreement was void.

Anderson & Rackham, for the appellants.

Thomas T. Leete, Jr., for the appellees.

<sup>86</sup> GRANT, J. These two instruments constitute but one instrument, and must be construed together. Briefly stated, the agreement is this: Plaintiffs, in consideration of fifteen hundred dollars, to be paid to them annually, agreed for a period of five years not to manufacture or sell chaplets, except for only one party. Plaintiffs' <sup>87</sup> sales were not limited to the place of manufacture, but extended into other states. The plain object of the agreement was to substantially close this part of plaintiffs' business, and to give defendants a monopoly of it. The parties evidently recognized the invalidity of such a contract, put in plain and unequivocal language, and sought to evade it by these two so-called leases. The arrangement was a bare subterfuge to evade the law. Defendants did not buy out plaintiffs' business, machinery, and plant, or lease them for the purpose of continuing their (plaintiffs') business. The result intended and accomplished was to close that part of plaintiffs' business, to throw their employés out of employment, and to deprive the public of any benefit from the continuance of their business. This is not the case of *Beal v. Chase*, 31 Mich. 490, where Beal purchased the entire plant, business, and goodwill of Chase for the purpose of continuing the same business. In that case both the employés and the public derived the same benefit as though the business were to be continued by Chase.

The learned counsel for plaintiffs concede the invalidity of those contracts which are entered into for the express purpose of, and result in, closing one's business for the benefit of a rival business, in throwing employés out of employment, and in depriving the public of the benefit of such business. Such contracts tend to destroy competition and create monopolies, and are void. Plaintiffs, however, seek to avoid the result of this contract on the ground that it is not in general restraint of trade, but is limited as to time and subject matter. They con-

cede that it is unlimited as to territory, and that the contract, if binding, covers the entire United States. They cite, among other cases, *Maxim-Nordenfelt Guns etc. Co. v. Nordenfelt, L. R. [1893] 1 Ch. Div. 630*, and *Mitchel v. Reynolds, 1 P. Wms. 181*. Those cases are, in their facts, the parallel of those in *Beal v. Chase, 31 Mich. 490*, and *Mitchel v. Reynolds, 1 P. Wms. 181*, is cited in the learned opinion of Justice Christiancy in *Beal v. Chase, 31 Mich. 519*, to which we refer for a statement and analysis of that case.

<sup>88</sup> Any such contract is invalid, whether the restraint be for one year or any number of years, or is unlimited as to time. The agreement to close one part of a business is as much against the policy of the law as a contract to close the entire. The one is as reprehensible as the other. They only differ in degree. Under this contention a party might agree with one person to close one part of his manufactory, and then agree with a second person to close the other part, the two constituting his entire business.

In *United States v. E. C. Knight Co., 156 U. S. 1, 16, 15 Sup. Ct. Rep. 249*, it is said: "All the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition": See, also, *Wright v. Ryder, 36 Cal. 342, 95 Am. Dec. 186*; *McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. Rep. 839*.

This contract is clearly within the inhibition of the laws of the United States (26 U. S. Stats. 209, c. 647) and the laws of this state (3 Comp. Laws 1897, sec. 11,377). We settled the principle governing contracts of this character in *Western Wooden Ware Assn. v. Starkey, 84 Mich. 76, 22 Am. St. Rep. 686, 47 N. W. 604*, and further discussion is unnecessary.

Judgment affirmed.

The other justices concurred.

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**A Contract in Partial Restraint of Trade and confined to a limited territory may be unlawful:** *Nester v. Continental Brewing Co., 161 Pa. St. 473, 41 Am. St. Rep. 894, 29 Atl. 102*. See the extended note to *Harding v. American Glucose Co., 74 Am. St. Rep. 235-273*, on unlawful trade combinations.



PATTERSON v. BOARD OF REVIEW OF GRAYLING TOWNSHIP.

[125 Mich. 126, 83 N. W. 1031.]

**TAXATION—EXEMPTIONS—LAW LIBRARY.**—Under a statute exempting from taxation the library of every individual, a law library owned by an individual is exempt.

Mandamus to compel the restoration to the assessment-roll of a law library, stricken therefrom as exempt.

Joseph Patterson, in propria persona.

George L. Alexander, for the respondent.

**127 PER CURIAM.** The only question in this case is “whether a law library is exempt from taxation,” under the provisions of section 9 of the tax law (Act No. 206, Pub. Acts 1893), which provides: “The following personal property shall be exempted from taxation, to wit: . . . 7. The library, family pictures, school-books, one sewing-machine used and owned by each individual, or family, and wearing apparel of every individual.”

We think that libraries belonging to individuals, whatever may be their character, are exempt under this section, and such we understand to have been the uniform interpretation that has heretofore been placed upon it.

The order of the circuit court is reversed, and a mandamus denied.

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**Exemptions.**—A lawyer may hold his law library exempt from execution: *Equitable Life Assur. Soc. v. Goode*, 101 Iowa, 160, 63 Am. St. Rep. 378, 70 N. W. 113.

## HUNT v. RABITOAY.

[125 Mich. 137, 84 N. W. 59.]

**LIFE TENANT—HOSTILE CLAIMS.**—A life tenant or one claiming under him cannot purchase hostile claims against the original title and set them up during the continuance of the life estate.

**REMAINDER—HOSTILE CLAIMS.**—One claiming under a life tenant can purchase outstanding titles to set up against the title of the remainderman upon the termination of the life tenancy.

**ESTATES OF DECEDENTS—TITLE TO.**—THE ALLOWANCE OF CLAIMS against an estate conveys no title to the land which may be sold to pay debts.

**PARTITION — PROOF — ACQUIESCENCE FOR SIXTY YEARS.**—Recitals in deeds, possession and occupation of land, improvements made thereon for a long series of years, and acquiescence for sixty years, furnish sufficient evidence that there was an actual partition of the land either by deed or by proceedings in the probate court, which have been lost and were not recorded.

**PARTITION OF LANDS BY THE GUARDIANS OF INFANTS AND INCOMPETENTS** will be sustained so long as no advantage is taken and the partition is equal.

**DEED OF INCOMPETENT PERSON — AVOIDANCE.**—PRIVIES IN BLOOD AND LEGAL REPRESENTATIVES are the only persons who can avoid the deed of an insane grantor.

Bill for a partition. Andre Viger was the original patentee of the land in dispute and other land. He died in 1812, leaving two daughters, Marie and Marie Louise. The latter was non compos mentis. One Castignett was appointed her guardian in 1825. Marie married Martin, and they conveyed part of the land to Massicot, in 1825. Massicot conveyed to Vermitte in 1835, who conveyed to Jean B. Bondie. This last deed recited that the land was confirmed to Andre Viger, and from him to Massicot by Castignett, Martin and wife, and the heirs of Andre Viger, deceased. Bondie conveyed part of the land, and died in 1859, leaving a will which devised the land in dispute to his son Alexander for life, remainder to certain children. In 1865 Alexander leased to Clark the entire life estate. Clark died in 1877, and his heirs (the complainants) continued in possession of the land and were in possession when this suit was begun. Defendants are the remaindermen entitled to the land after the death of Alexander Bondie, who was still alive when the case was decided in the court below. In 1833 Piatt was appointed guardian of Marie Louise Viger, who applied to have her interest in the land of Andre Viger sold, the petition reciting that the land had been amicably partitioned by the

heirs, and the land sold belonged to Marie Louise. The land was subsequently conveyed to Piatt. In 1826 Marie Martin conveyed her interest in the one hundred and eighty acres in the rear of the land in dispute to her father's executor. In 1830 she made another deed to the executor of one-half of this land, in which it was recited that the land had been amicably divided between the heirs. The executor conveyed to Piatt in 1833, reciting an amicable partition. Piatt subsequently conveyed this land encumbered with the duty of maintaining Marie Louise. Marie Louise died in 1868, and her administrator inventoried one-half of the land in dispute as her land. Some claims were allowed, of which Clark took an assignment, and a quitclaim deed from the claimants of their supposed interest in the land. It being represented that Marie Louise died without heirs, her property escheated to the state, and the widow of Clark purchased the state's interest in the land, and complainants brought suit to quiet title against the unknown heirs of Marie Louise, none of the defendants being made parties to the suit. A decree was rendered in that suit in accordance with the prayer. In the present suit, the bill was dismissed.

Bethune Duffield and John D. Conely, for the complainants.

John W. Beaumont and Eugene S. Clarkson, for the defendants.

**141** GRANT, J. 1. The court below entered a decree dismissing the bill, for the reason that complainants could not, during the lifetime of Mr. Bondie, the life tenant, purchase hostile claims and set them up in opposition to the title of the life tenant. Mr. Clark, during his life, and complainants since his death, were in possession of the entire property as owners only of the life estate. They stand in the same position as did Alexander Bondie, and have no more right than he possessed. Their relation is so nearly that of landlord and tenant that the complainants cannot be heard to dispute the title of the life tenant: *Board v. Board*, L. R. 9 Q. **142** B. 48; *Caufman v. Presbyterian Congregation*, 6 Binn. 59.

Mr. Clark could purchase outstanding titles to set up against the title of the remaindermen upon the termination of the life tenancy: *Clark v. Adie*, 2 App. Cas. 435; *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. Rep. 407; *Fuller v. Sweet*, 30 Mich. 239, 18 Am. Rep. 122.



It would be unnecessary, therefore, to discuss other questions in the case, were it not for a stipulation filed in this court by the solicitors for the respective parties that the case might be heard here as though commenced after the death of Alexander Bondie. This stipulation, however, makes it necessary to dispose of the case upon other grounds.

2. Complainants have no title except by deed from the state as escheated land. The administration of the estate of Marie Louise was settled and final account allowed, the land was not sold, and by the administrator no proceedings were taken to sell. The allowance of claims against an estate conveys no title to the land which may be sold to pay debts, and the deeds, made by the owners of claims against the estate, were worthless to convey title.

Two questions are presented for determination: 1. Was there an amicable partition of these lands by deed or by parol? 2. If such partition was made, was it valid as against Marie Louise, an incompetent? A third question is also raised, viz.: If the partition was by parol, is it valid?

Our statute was adopted from that of New York, and before its adoption here the question was decided in *Jackson v. Harder*, 4 Johns. 202, 4 Am. Dec. 262, in which a parol partition was held valid: See, also, *Jackson v. Vosburgh*, 9 Johns. 270, 6 Am. Dec. 276. We, however, deem it unnecessary to decide this question.

We think the recitals in the deeds above mentioned, the possession and occupation of the land by each, and the improvements made thereon for a long series of years, and the sale of a portion of the land north of Ecorse creek as <sup>143</sup> belonging to Marie Louise, and the sale of four parcels by Jean B. Bondie, furnish sufficient proof, after so long a period, that there was an actual partition of the land by deed or by proceedings in the probate court, which have been lost and were not recorded. The recitals in these old deeds and the conduct of the parties are consistent only with an actual partition. After the expiration of sixty years, it is a just conclusion, under the record in this case, that there was a legal partition.

It is urged by complainants that the partition, if one was made, was of the land north of the Ecorse river, and not of the land in dispute, which lay south of it. Without setting out more fully the testimony in detail, we are satisfied that this is not the correct conclusion to be deduced from the facts. There is no testimony in the record to indicate that Mrs. Bartin or

her grantees ever made any claim to any portion of the land north of the creek after the partition. On the contrary, as already shown, Mrs. Bartin and her grantees treated the land in dispute as their own, and the guardians of Marie Louise acquiesced. It is also apparent that the land north of the creek was treated as belonging to Marie Louise.

3. We think partition of lands by the guardians of infants and incompetents is fully sustained by the authorities as well as by reason. Either cotenant could compel a partition. What may be compelled by the law parties should be allowed to accomplish amicably, so long as no advantage is taken and the partition is equal: Freeman on Cotenancy and Partition, secs. 414, 415; 2 Coke on Littleton, secs. 243, 258; Williard v. Williard, 56 Pa. St. 119; Brooks v. Hubble (Va.), 27 S. E. 585. The territorial law then in force authorized the guardian "to divide the real estate in as full and ample a manner as the idiot, lunatic, non compos, or distracted person might or could were they restored to the full use of their rational faculties": 1 Terr. Laws, 377. Whatever may be the interpretation of this statute, it certainly evidences an intent to repose a broad power in the guardian.

<sup>144</sup> There is no evidence in this case to show that this partition was an unequal one. If, however, it were unequal, these complainants are not in position to raise that question and to avoid it. They are neither privies in blood nor are they the legal representatives of Marie Louise Viger, and only these two classes can avoid the deed of an insane grantor. They simply hold as purchasers of escheated lands: 1 Jones on Real Property, sec. 64; Hunt v. Weir, 4 Dana, 347; Beverly's Case, 4 Coke, 123b; Breckenridge v. Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71.

Decree is affirmed.

The other justices concurred.

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**On the Relative Rights of Life Tenants and Remaindermen,** see the monographic note to Allen v. De Groodt, 14 Am. St. Rep. 628-639. The statute of limitations does not run against a remainderman until the termination of the life estate: Sutton v. Clark, 59 S. C. 440, 82 Am. St. Rep. 848, 38 S. E. 150.

**On Partition of Lands of Persons Under Legal Disability,** see Hemmich v. High, 2 Watts, 159, 27 Am. Dec. 295; Calhoun v. Hays, 8 Watts & S. 127, 42 Am. Dec. 275; Roodhouse v. Roodhouse, 132 Ill. 360, 22 Am. St. Rep. 539, 24 N. E. 55. Infants are as much bound by partition proceedings as adults, if they are regularly brought into court, and guardians appointed for them: Sites v. Eldredge, 45 N. J. Eq. 632, 14 Am. St. Rep. 769, 18 Atl. 214.

## STRETCH v. CASSOPOLIS.

[125 Mich. 167, 84 N. W. 51.]

**TOWNS—SHADE TREES IN STREET—REMOVAL—NOTICE TO PROPERTY OWNER.**—Where shade trees have been planted and maintained in the streets of a town by the abutting property owner, who owns to the center of the street, the town cannot cut down and remove such trees without previous notice to the abutting owner to remove them.

**MUNICIPAL CORPORATIONS — REMOVING TREES FROM STREET.**—While an abutting owner has the title to shade trees in the street adjoining his premises, the municipality may, when the public necessities call for such action, require such shade trees to be removed.

*Trespass quare clausum fregit.*

M. L. Howell, for the appellant.

Coy W. Hendryx and Harsen D. Smith, for the appellee.

**168 MONTGOMERY, C. J.** The sole question which this record presents is whether a village, acting under the general incorporation act (1 Comp. Laws 1897, c. 87), may cut down and remove shade trees standing within the highway, and which have been planted and maintained by the abutting owner, who owns to the center of the street, when such removal is without previous notice to the abutting owner to remove the trees.

There is no question but that the abutting owner has the title to shade trees adjoining his premises: *Cooley on Torts*, 318; *Clark v. Dasso*, 34 Mich. 86; *Rogers v. Randall*, 29 Mich. 41; *People v. Foss*, 80 Mich. 559, 20 Am. St. Rep. 532, 45 N. W. 480. It is equally well settled, and is conceded by the learned counsel for the plaintiff, that the municipality may, when the public necessities appear to it to call for such action, require such shade trees to be removed. The question is whether, as preliminary to their removal by the public authorities, the owner should have notice of the fact that the public necessity requires the removal of the trees, and be given the opportunity to himself transplant them or remove them. The case of *Clark v. Dasso*, 34 Mich. 86, answers this question in the following language: "It is to be remembered that the trees are the property of the adjacent owner, who cannot lawfully be deprived of any species of property in the summary mode which was adopted in this case. If the trees must be removed, he may prefer to take them as living trees, and transplant them elsewhere, per-



haps in more suitable localities in the street; and he should not be compelled to cut them down where removal is preferred."

We are satisfied that this view applies with as much force in the present case as in *Clark v. Dasso*, 34 Mich. 86. No other view is consistent with ownership of the trees by the adjacent owner. True, this title is subservient to the public right, but the public right may well be exercised in a manner not to entail entire loss of property upon the owner. It may be true that the language quoted is dictum, but <sup>169</sup> such has been understood to be the law for many years, and we discover nothing in the rule which imposes on the public authorities any great burden.

The case of *Wyant v. Central Telephone Co.* is not inconsistent with this holding. In that case, which may be found in 123 Mich. 51, 81 Am. St. Rep. 155, 81 N. W. 928, notice to the owner could furnish no opportunity to avoid the cutting of limbs. Whatever damage a tree might sustain by such cutting could not be obviated by the owner. Therefore, notice to the owner would serve no purpose. In case of the destruction of the tree an entirely different consideration obtains. The owner who has notice of the public requirements is in a position to protect himself in a large part from damages. So clearly is this a valuable right that it has been held that a duty rests on the owner to protect himself from unnecessary damage; as in *Shawnee County Commrs. v. Beckwith*, 10 Kan. 603, where in a condemnation case the owner of a hedge sought allowance for the value of it, and it was held that the allowance should be limited to the cost of removing the hedge and its depreciation in value by reason of the transplanting.

It is contended that the plaintiff in this case did not suffer because of the failure to give notice, because she testified that, if she had had notice, the trees would not have been removed. Whether the plaintiff meant by this that she would have taken steps to prevent their removal, or that she herself would not have removed them and allowed the village authorities to do so, is not quite clear, but it does appear that she was not given the opportunity to decide the question. The removal was, therefore, an invasion of her legal rights, and the judgment for the damages sustained is affirmed.

Moore, Long, and Grant, JJ., concurred with Montgomery, C. J.

HOOKER, J., while concurring in the opinion that the village was liable upon the ground that agents of the village converted the trees to the use of the village after they were cut, dissented from the view that a right of action exists in every case where a notice has not been given, and said that a village does not become a trespasser "so long as it does not do unnecessary damage to the owner either by greater injury to the trees than is necessary, or by preventing their removal to another location by the owner where feasible, which would be doing unnecessary injury. . . . If the tree could not, by any possibility, be saved, or if the owner should not care to remove it, or if it were not practicable to do so profitably, there would be no damage, and a rule which subjects a municipality to damages and costs in such a case is, in my opinion, unjust."

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**Highways and Streets—Trees in.**—The owner of land taken for a highway, still owning the fee, owns the herbage and trees upon the land, subject only to public use for the purposes for which the land was taken, and incidental purposes: Note to *People v. Foss*, 20 Am. St. Rep. 537. An abutting proprietor's ownership of trees in a city street is qualified and limited, subordinate to the public right to safe and convenient passage, and to the rights, powers, and duties of the governing municipality in the protection and promotion of every public use in the streets. If, however, under the guise of municipal authority such trees are cut or trimmed beyond the necessity therefor, the owner may recover damages: *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 55 Am. St. Rep. 930, 19 South. 1. That notice must be given to the owner of the trees before their removal, see *Miller v. Detroit etc. Ry.*, 125 Mich. 171, post, p. 569, 84 N. W. 49.

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## MILLER v. DETROIT, YPSILANTI & ANN ARBOR RY.

[125 Mich. 171, 84 N. W. 49.]

**STREET RAILROADS—REMOVAL OF SHADE TREES—DAMAGES.**—A street railroad company has the right to remove shade trees within the limits of the public highway, for the construction of its road as established by the township authorities, without compensation for damages.

**STREET RAILROADS—REMOVING TREES—NOTICE.**—NEITHER A MUNICIPALITY nor a street railroad company has the right to remove shade trees without notice to the owner, and an opportunity given to him to remove them as he may see fit.

Trespass quare clausum fregit against the defendant. Judgment for the plaintiff.

Cutcheon & Stellwagen and John D. MacKay, for the appellant.

Tracy L. Towner and John P. Kirk, for the appellee.

<sup>172</sup> GRANT, J. The principal and important question in the case is: Has a street railway company the right to remove shade trees within the limits of the public highway, for the construction of its road as established by the township authorities, without compensation for damages? The same principle was involved in *Wyant v. Central Telephone Co.*, 123 Mich. 51, 81 Am. St. Rep. 155, 81 N. W. 928. We there distinctly held that a telephone company had the right to cut out the branches of the trees along the public highway under a franchise similar to that here conveyed. The same necessity may exist for the removal of trees as may exist for the removal of their branches. The principle is the same in either case. It is established beyond controversy that municipal authorities have the entire control over their highways, streets, and sidewalks, and may remove shade trees whenever they are an obstruction to the use of the highway for public travel, without compensation to the owner: *Vanderhurst v. Tholcke*, 113 Cal. 147, 45 Pac. 266; *Everett v. Council Bluffs*, 46 Iowa, 66; *Wilson v. Simmons*, 89 Me. 242, 36 Atl. 380.

It is true that these trees were lawfully planted, and that they are the private property of the abutting owner. It is also true that one planting trees in the public highway plants them with the understanding that they can remain there only so long as the space occupied by them is not required for public use. These roads are not an additional servitude, as we have repeatedly held. When, therefore, their construction is duly authorized, it logically follows that the company has the right to remove from the highway any obstruction which interferes with the proper construction and operation of the road. Such power is necessarily implied: *Dodd v. Consolidated Traction Co.*, 57 N. J. L. 482, 31 Atl. 980; *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 55 Am. St. Rep. 930, 19 South. 1. When a man dedicates his land for a public highway, or it has been condemned for that purpose and he has been compensated, it is definitely <sup>173</sup> understood by him that whatever he may lawfully do within the boundaries of that highway is done with the right of the lawful authorities to appropriate the entire width of the highway for purposes of travel, if it shall become necessary. Street railways, in city and country, have come to be regarded as a public necessity, and their construction upon the highways universally sanctioned. If the township authorities may remove any obstruction to the public use, there seems to be no sound reason why they may not authorize street railway companies, telephone



companies, and the like to do so, when such companies are lawfully entitled to the use of the streets. It is conceded that the township authorities in this case were authorized to grant the franchise to the defendant, and to determine in what part of the highway its road should be constructed. The township authorities might possibly fix, as a condition to the grant, the payment of damages for the destruction of shade trees. The legislature undoubtedly has the power to provide that abutting owners should be compensated for the damage that must result to them in the destruction of their trees. That, however, is a matter for the determination of the legislature, and not for the courts. The legislature has granted the power to do it without compensation. The township authorities have not provided for it. Courts are therefore powerless.

But there is one fatal defect in the defendant's proceedings. It secured no greater rights by its franchise than the municipality had. The law gives neither the right to remove shade trees without notice to the owner, and an opportunity given to him to remove them as he may see fit: *Clark v. Dasso*, 34 Mich. 86. Under that decision plaintiff was entitled to recover for damages, and the judgment must, therefore, be affirmed: See, also, *Stretch v. Cassopolis*, 125 Mich. 167, ante, p. 567, 84 N. W. 51.

Judgment affirmed.

Montgomery, C. J., Moore and Long, JJ., concurred with Grant, J.

HOOKER, J., DISSENTED, on the ground that the qualified property which an abutting owner has in shade trees in a street is subject to the right of the public to make use of the highway as the public interests require, though they should thereby suffer injury or destruction. The justice calls attention to the fact that the idea that the owner is entitled to notice of removal originated in the statute, chapter 28 of the Revised Statutes of 1846. This statute was construed in *Clark v. Dasso*, 34 Mich. 86, and held to require notice and a reasonable opportunity for the owner to remove his trees. This statute was amended in 1875, and the provision requiring notice was omitted. "In my opinion, it has never been the rule at common law that the authorities must, before using or mending any portion of the public highway, give notice to the abutting owner that his grass or trees were to be injured or destroyed, unless removed, and then wait for such removal for such a period of time as a jury might say afterward would have been reasonable": Citing *Makepeace v. Worden*, 1 N. H. 16; *Winter v. Peterson*, 24 N. J. L. 524, 61 Am. Dec. 678; *Dodd v. Consolidated Traction Co.*, 57 N. J. L. 482, 31 Atl. 980; *Ely v. Parsons*, 55 Conn. 83, 10 Atl. 499;

Theobold v. Louisville etc. Ry. Co., 66 Miss. 279, 14 Am. St. Rep. 564, 6 South. 230; Brainard v. Clapp, 10 Cush. 6, 57 Am. Dec. 74; Southern Bell Tel. Co. v. Francis, 109 Ala. 224, 55 Am. St. Rep. 930, 19 South. 1; Chase v. City of Oshkosh, 81 Wis. 313, 29 Am. St. Rep. 898, 51 N. W. 560; Livingston v. Wolf, 136 Pa. St. 519, 20 Am. St. Rep. 936, 20 Atl. 551; Tate v. City of Greensboro, 114 N. C. 392, 19 S. E. 767.

The justice continued: "The alleged right of recovery is not left to depend upon the infliction of actual and unnecessary damage, but upon the omission of a technical notice, which it is claimed may alone constitute a trespass. If this is so, the rule must extend to the cutting of any tree by the highway commissioner without notice and reasonable delay, no matter how great the exigency, and although it may be a benefit, instead of an injury to the abutting owner; and if this is so as to a tree, it is also true of the grass or the shrubs that spontaneously grow upon the borders of the highway. I think this position is untenable. We have held in the case of Wyant v. Telephone Co., 123 Mich. 51, 81 Am. St. Rep. 155, 81 N. W. 928, that the cutting of branches was not actionable unless excessive or unnecessary injury was inflicted, and that should be the rule here. If the cutting of a tree without notice is a trespass, the cutting of half of a tree without notice is a trespass."

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**Streets—Removal of Trees in.**—Where shade trees have been planted and maintained in the streets of a town, by the abutting property owner, who owns to the center of the street, the town cannot cut down and remove them without notice to the owner to remove them: Stretch v. Cassopolis, 125 Mich. 167, ante, p. 567, 84 N. W. 51. When the public necessities call for the removal of such trees, however, the municipality may authorize such action: Stretch v. Cassopolis, 125 Mich. 167, ante, p. 567, 84 N. W. 51; Southern Bell Tel. Co. v. Francis, 109 Ala. 224, 55 Am. St. Rep. 930, 19 South. 1.

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## SAX v. DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY.

[125 Mich. 252, 84 N. W. 314.]

**TRIAL—PLEADING AND PROOF—VARIANCE.**—Where a declaration alleges a contract to employ the plaintiff as a brakeman on a passenger train, at which he had been employed before, and the proof shows that his previous service was as a brakeman on a freight train, the only variance being as to the recital of his former occupation, it is immaterial.

**RAILROADS — GENERAL SUPERINTENDENT—RATIFICATION OF CONTRACT OF EMPLOYMENT.**—The authority of the general superintendent of a railroad company to ratify an offer of employment made by a train master, in settlement of a claim for

personal injuries, and a completion of the contract, will be presumed in the absence of proof to the contrary.

**CONTRACT OF EMPLOYMENT—STATUTE OF FRAUDS.** Since a contract to employ another may be performed within a year, it need not be in writing to satisfy the statute of frauds.

**CONTRACT TO EMPLOY—CONSIDERATION—MUTUAL PROMISES.**—Where one agrees to release a former employer from liability for injuries while in his employ in consideration of a promise of re-employment, the execution of the release and the promise to re-employ are mutual and binding promises.

**CONTRACT TO EMPLOY—SATISFACTION—DISCHARGE—REASONS.**—Where one has been discharged by reason of dissatisfaction with service under a contract to perform duties to the entire satisfaction of the employer, the reasons for, or the justice of, the employer's dissatisfaction cannot be inquired into.

**CONTRACT TO EMPLOY—BREACH OF—SATISFACTION.** Where one, who has been employed so long as his services are satisfactory, is laid off for some reason other than a dissatisfaction with his service, a failure to employ him thereafter constitutes a breach of the contract.

**CONTRACT TO EMPLOY—BREACH—DAMAGES—MORTALITY TABLES.**—In an action by one for the breach of a contract to employ him so long as his services were satisfactory, mortality tables cannot be introduced as bearing on the expectancy of life, in connection with the question of damages.

Geer & Williams and E. W. Meddaugh, for the appellant.

Watson & Chapman, for the appellee.

**253** HOOKER, J. The plaintiff's hand was injured while acting in the capacity of brakeman upon a freight train upon the defendant's railroad, and he was idle for about four months. He then resumed work as a passenger brakeman upon another branch of defendant's road, and worked about four months, when he was dismissed, according to plaintiff's claim, and laid off because the service of a brakeman was dispensed with upon his trains, according to the defendant's contention. He brought this action to recover damages for the breach of a contract which he says was made between the defendant and himself after his injury, whereby, in consideration of a release of a claim for damages upon account of his injury, the defendant promised to give him a permanent position in its employ, which was to last during his lifetime, as long as his services and conduct were satisfactory to the company. The defendant has brought error upon a judgment of nineteen hundred and fifty dollars in plaintiff's favor.

**254** The first point raises the question of a variance between the declaration and proof. Plaintiff's declaration stated that: "And afterward, on, to wit, the fifteenth day of January, A. D.



1896, said plaintiff and said defendant entered into a contract as follows: Said plaintiff agreed to release all claims against said defendant for damages on account of the above-named injuries in consideration that said defendant would give him re-employment so long as his services and conduct were satisfactory, said plaintiff having been theretofore employed by said defendant as a brakeman on a passenger train, and by the terms of said contract said defendant agreed to re-employ him as such."

The proof shows that his previous service was as brakeman on a freight train, while the declaration alleged that he had been employed upon a passenger train. The question was raised at the close of the testimony by a motion to strike out the evidence because the declaration alleged an agreement to employ the deceased as a passenger brakeman, while the proof tended to show a promise to employ him as a brakeman on freight trains, or to give him a permanent position. It was also raised upon a request to direct a verdict for the defendant. The declaration explicitly alleges that the defendant promised to employ the plaintiff as a passenger brakeman. Plaintiff testified that the agreement was to give him a permanent position during his lifetime, as long as he should perform his duties to the satisfaction of the company, and that there was talk about the kind of employment, and Mr. Cooper, the train-master, offered him the place of a gate-tender, and that he refused that, and asked for a passenger run on the T., S. & M. branch. Cooper said he (the plaintiff) would have to see Mr. Atwater. He afterward went to see Mr. Atwater, the general superintendent, at his office, and had a conversation with his clerk, who went into the next room, and told Mr. Atwater that Mr. Sax was there; and that Mr. Atwater said, "You tell Mr. Sax that we have made provision for him over on the T., S. & M.," and that he heard this conversation between the clerk and Atwater. <sup>255</sup> Atwater then said that he should report for duty to Mr. Wykes, who was defendant's agent at Owosso, and he did so about two months later. Wykes gave him a release to sign, and he went to work as a passenger brakeman. From this testimony it might be found that the minds of the parties met upon an employment as passenger brakeman, which is what the declaration alleges. The only variance between the declaration and the proof relates to a recital of his former occupation, which is an unsubstantial matter, and therefore immaterial: *Lull v. Davis*, 1 Mich. 77; *Lothrop v. Southworth*, 5 Mich. 436; *Arnold v. Nye*, 23 Mich.

286; Barton v. Gray, 48 Mich. 164, 12 N. W. 30; Bennett v. Beam, 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8; Tillman v. Fuller, 13 Mich. 113; Patterson v. Detroit etc. R. R. Co., 56 Mich. 172, 22 N. W. 260.

It is claimed that the talks with Cooper, and Main (the clerk), and Atwater were not admissible, because their authority to make such contract was not proved. If the matter rested upon the talk with the train-master, we should sustain defendant's contention, under the decision in Maxson v. Michigan Cent. R. R. Co., 117 Mich. 218, 75 N. W. 459; but, taken in connection with the conversation of the general superintendent, and the presentation of the release, which had been demanded in the talk with Cooper, and the subsequent employment, and the failure of defendant to introduce evidence to the contrary, we think this conversation pertinent as tending to show knowledge and ratification of Cooper's offer, and completion of the contract, by the general superintendent, whose authority in matters pertaining to the business of operating the road will, in the absence of proof to the contrary, be presumed to cover such a contract: 1 Elliott on Railroads, sec. 297.

Counsel say that the court erred in refusing to direct a verdict for the defendant: 1. Because the contract was not in writing; 2. Because there was no consideration for the promise; 3. Because the defendant had a right to terminate it at will. The contract in question might have <sup>256</sup> been performed within a year, and therefore the first point is not well taken: Smalley v. Mitchell, 110 Mich. 650, 68 N. W. 978. The execution of the release and a promise to re-employ were mutual promises, and the contract was, therefore, binding. The difference between this case and Potter v. Detroit etc. Ry. Co., 122 Mich. 179, 81 N. W. 80, 82 N. W. 245, is easily apparent. The case does not fall within the rule of Koehler v. Buhl, 94 Mich. 496, 54 N. W. 157, because there is no claim in this case that plaintiff was discharged for the reason that the company was dissatisfied with him.

The court permitted the introduction of the mortality tables, as evidence bearing on the expectancy of life, in connection with the question of damages. It is urged that they ought not to be applied to a contract which the defendant might terminate at will. In answer to an inquiry made by a juror, the court told the jury that they should allow him damages, subject to his probable earnings, up to the expectancy of life, and that they should not take into account a possible re-employment by

the defendant. Under the contract alleged and proved, the defendant had the right to terminate the employment whenever the plaintiff did not perform his duties to the entire satisfaction of the defendant. Under the rule as settled in this state, the reasons for, or justice of, the defendant's satisfaction cannot be inquired into: See *Wood etc. Machine Co. v. Smith*, 50 Mich. 570, 45 Am. Rep. 57, 15 N. W. 906; *Bucksport etc. Ry. Co. v. Brewer*, 67 Me. 295; *Singerly v. Thayer*, 108 Pa. St. 291, 56 Am. Rep. 207, 2 Atl. 230; *Seeley v. Welles*, 120 Pa. St. 75, 13 Atl. 736; *Campbell Printing-Press Co. v. Thorp*, 36 Fed. 414; *Pierce v. Cooley*, 56 Mich. 552, 23 N. W. 310; *McCormick Harvesting-Machine Co. v. Cochran*, 64 Mich. 641, 31 N. W. 561; *Plano Mfg. Co. v. Ellis*, 68 Mich. 105, 35 N. W. 841; *Platt v. Broderick*, 70 Mich. 580, 38 N. W. 579; *Koehler v. Buhl*, 94 Mich. 500, 54 N. W. 157. It was admitted that the defendant company <sup>257</sup> discontinued the service of the plaintiff when the service of a brakeman on the trains upon which he was at work was dispensed with, for that reason, through Mr. Cooper, the train-master. It affirmatively appears, therefore, that he was not laid off by reason of dissatisfaction with his service, and a failure to employ him thereafter constituted a breach of the contract.

It has been held in some cases that mortality tables were not admissible in negligence cases where the injury did not result in death or permanent disability: See *Mott v. Detroit etc. Ry. Co.*, 120 Mich. 127, 136, 79 N. W. 6; *Nelson v. Chicago etc. R. R. Co.*, 38 Iowa, 568. In Texas it is held that the disability must be not only permanent, but total, to admit of such proof. In *Texas-Mexican Ry. Co. v. Douglass*, 69 Tex. 699, 7 S. W. 77, it was said that such evidence is admissible only when the earning capacity is entirely destroyed, and that, when the disability is only partial, such evidence would tend to confuse the jury: See, also, *St. Louis etc. Ry. Co. v. Nelson*, 20 Tex. Civ. App. 541, 49 S. W. 710; *McDonald v. Chicago etc. R. R. Co.*, 26 Iowa, 139, 96 Am. Dec. 114.

Upon the theory that plaintiff had contracted for employment for life, and that the defendant wrongfully refused further employment after the expiration of four months, the jury might take into consideration the probable period of his ability to perform service; and the probable duration of his life would, in such case, be an element in that problem: *Freeman v. Fogg*, 82 Me. 408, 19 Atl. 907; *Parker v. Russell*, 133 Mass. 74; *Tippin v. Ward*, 5 Or. 450; *Schell v. Plumb*, 55 N. Y. 592; *Burritt v.*



Belfy, 47 Conn. 323, 36 Am. Rep. 79. The tables of mortality are admissible wherever the expectancy of life properly comes in controversy. They are not conclusive, however: *Nelson v. Lake Shore etc. Ry. Co.*, 104 Mich. 582, 62 N. W. 993; *Damm v. Damm*, 109 Mich. 619, 63 Am. St. Rep. 601, 67 N. W. 984. In this case there were elements to be considered other than the duration of his life. The jury were instructed that they should find how much <sup>258</sup> he was earning under his employment by defendant, and that whatever the evidence showed to be the value of other employment that he had been able to get should be deducted from such former earnings, and that would give them a starting point. From a colloquy with a juror they must have understood that the computation should be made upon his expectancy of life, subject to the deduction of what they should find he might earn up to the time of his death, and subject to a reduction to the present value. The jury were expressly told that they could not consider any liability of his re-employment. The theory of the defendant appears to have been that he was not discharged; but whether this was so or not, or if the failure to employ for four months constituted a breach of the contract justifying a refusal to re-enter the defendant's employ (a question not discussed, and therefore not passed upon), it was proper for the jury to consider an offer of re-employment from the railroad, if there was a probability of any, as bearing upon the probable amount of his future ability to earn. His probable infirmity was also important in this connection.

Again, the contract was not to employ for life. It was limited by the provision as to his giving satisfaction, and that also was an element that should have been considered by the jury. But the contract was, in effect, merely a contract to employ so long as his service should prove satisfactory. Under the cases cited, the mortality tables should have been excluded.

The judgment is reversed, and a new trial ordered.

The other justices concurred.

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Contracts for Permanent Employment are considered in the note to *Pennsylvania Co. v. Dolan*, 51 Am. St. Rep. 301-303. Such contracts may be enforced, and, as they may be performed within a year, are not within the statute of frauds: *Carnig v. Carr*, 167 Mass. 544, 57 Am. St. Rep. 488, 46 N. E. 117. In *Louisville etc. R. R. Co. v. Offutt*, 99 Ky. 427, 59 Am. St. Rep. 467, 36 S. W. 181, it is held that a contract of a railway corporation to give one regular work as a conductor, and that such work shall continue so long as the employé faithfully and honestly works for his employer, is indefinite as to the time of employment, and is, therefore, subject to termination at any time at the discretion of either party. For a con-

tract for permanent employment entered into by a railway company with an injured brakeman, see *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802.

**Contract to Employ—Satisfaction.**—In *Tyler v. Ames*, 6 Lans. 280, it was held that a contract to employ an agent for a year, if he "could fill the place satisfactorily," could be terminated by the employer when in his judgment the agent failed to meet that requirement of the contract. The court said that the word "satisfactorily" referred to the mental condition of the employer: Note to *Duplex Safety Boiler Co. v. Garden*, 54 Am. Rep. 711. See, too, the note to *Werner v. Bergman*, 42 Am. Rep. 158.

**Evidence.**—On the admissibility of life tables in evidence, see *Greer v. Louisville etc. R. R. Co.*, 94 Ky. 169, 42 Am. St. Rep. 345, 21 S. W. 649; *Steinbrunner v. Pittsburgh etc. Ry. Co.* 146 Pa. St. 504, 28 Am. St. Rep. 806, 23 Atl. 239; *Damm v. Damm*, 109 Mich. 619, 63 Am. St. Rep. 601, 67 N. W. 984.

## BARKER v. VALENTINE.

[125 Mich. 336, 84 N. W. 297.]

**COMMON-LAW MARRIAGE — DISABILITY OF ONE PARTY—CONTINUED COHABITATION.**—Where an attempted marriage is void by reason of the disability of one of the parties, a subsequent marriage will be presumed after the disability has been removed, where the matrimonial relationship is continued, and the parties hold themselves out, and are regarded and treated by their relatives and friends, as husband and wife.

Edward S. Grece and William B. Jackson, for the complainant.

Phillips & Jenks, for the defendant Valentine.

De Vere Hall, for the defendant Great Camp of Knights of Maccabees.

336 MOORE, J. April 20, 1892, George A. Valentine, a resident of Detroit, made a written application for membership 337 in the Great Camp of the Knights of the Maccabees. In that application, among others, the following questions were asked and answered: "Q. Are you married? A. Yes. . . . Q. The name and relation of the party or parties for whose benefit your certificate is to be applied? A. Margaret I. Valentine, wife."

He declared that the above were fair and true answers to the questions. The Margaret I. Valentine mentioned in the application is the same person who is a defendant in this case.

A certificate was issued in which it was stated that, if the certificate was in force at the time of the death of Mr. Valentine, upon satisfactory proof of his death "his beneficiary, to wit, Margaret I. Valentine, his wife, will be entitled to receive one assessment on the membership, but not to exceed two thousand dollars." Mr. Valentine died December 3, 1896. Due proofs of his death were furnished the great camp.

After the proofs had been filed, a protest was filed with said order by the complainant, Mary H. Barker, who is a sister of Mr. Valentine, against the payment to the said Margaret I. Valentine of the amount of such certificate, on the ground that the said Margaret was not the wife of the said George A. Valentine. After the filing of the said protest notice was given by said order to both said Margaret and the said Mary H. Barker, or their attorneys, and the matter was referred to the executive committee of the great camp; and said committee, acting under and in accordance with its laws, appointed a time and place for the hearing of the respective claims of the said Margaret and the said Mary H. Barker. Several adjournments were had, and finally the matter was heard before said committee, a large amount of proofs being filed before them; and the said committee, acting without fraud and in good faith, decided that, under the proofs, the payment of the amount of said certificate should be made to the <sup>338</sup> said Margaret I. Valentine. An appeal was taken, as provided by the laws of said order, by Mary H. Barker to the Great Camp of the Knights of the Maccabees for the state of Michigan. This appeal was heard before the committee on appeals and grievances, on the testimony presented before the executive committee, and also on additional testimony presented to them. At the hearing before the executive committee, and at the hearing before the committee on appeals and grievances, both parties were represented by counsel; and, after a full hearing, the last-named committee decided in favor of Margaret I. Valentine, and recommended to the great camp that the amount of the certificate be paid to her. The report was adopted by the great camp, then in session, after a hearing before the great camp, in which the complainant was represented by counsel, and by the action of the great camp its officers were instructed to pay the amount of such certificate to the said Margaret I. Valentine. Thereupon, and before the payment of the amount of such certificate, the complainant filed the bill in this case to restrain the organization from paying the money to the said Margaret, and to require the payment of the same to the



said Mary H. Barker. After a full hearing the court dismissed the bill of complaint, and the case is brought here by appeal.

The questions presented to the court are: 1. Was the beneficiary named in the certificate the wife of George A. Valentine? 2. Under the laws of the order, have these parties a right to appeal to the courts, or is the action of the order final? 3. In any event, can the complainant be entitled to the fund in question?

As we think the answer to the first question is decisive, we shall not discuss the others.

The facts are not in dispute. So far as material they are as follows: In 1872 Mr. Valentine was married to Ida Barron in the state of New York. Differences arose <sup>339</sup> between them, and Mr. Valentine instituted divorce proceedings against his wife. An order was made requiring him to pay alimony and solicitor's fees. He did not comply with this order, and it does not appear that anything further was done in that proceeding. In 1884 Mr. Valentine came to Detroit, Ida Valentine remaining in the state of New York. Margaret Desbrough was a resident of Detroit. In 1881 she filed a bill of complaint for divorce against her husband, Henry Desbrough, which resulted in the court granting her a decree of divorce. The decree was not entered in the records at that time, though Mrs. Desbrough did not know of that fact until after the death of George Valentine, when the court made an order directing the decree to be entered nunc pro tunc. It is claimed in the brief of counsel that in May, 1885, a marriage ceremony was performed at Detroit between George A. Valentine and Margaret Desbrough. Upon the trial of this case the fact was not proven, but it was proven that he introduced Mrs. Desbrough as his wife, and stated they had been married, and they lived and cohabited together as husband and wife. Some time after this occurred, Mr. Valentine and Margaret Valentine returned to Mr. Valentine's former home, in New York; and in September, 1889, Ida Valentine made a complaint against Mr. Valentine as a disorderly person, for failing to support her, and a warrant was issued. The docket of the police court showed that Mr. Valentine pleaded "not guilty," and that on the adjourned day the parties failed to appear. Mr. Valentine claimed to his acquaintances in New York that he had then been divorced from the first wife, but there is nothing in the record to show that he had in fact been divorced. In October, 1889, Ida Valentine died. The record does not disclose just when Mr. Valentine returned to Detroit, but he had been living there some time when

he made application for membership in the defendant order, with Margaret Valentine, he introducing her as his wife, and she introducing him as her husband, and they living together as husband and wife. Shortly after this Mr. and Mrs. <sup>340</sup> Valentine moved to Cleveland, and rented a house of Mr. Case, in which they lived for more than six years, and until the time of his death. The testimony is overwhelming that in Cleveland they lived together as husband and wife. Mrs. Valentine was a member of a church belonging to one of the leading denominations. They introduced each other as husband and wife. They lived in a respectable neighborhood, were visited by respectable people, and in turn visited respectable people. The complainant in this case lived with them for a time, and also corresponded with them, as did other relatives of Mr. Valentine, and treated the defendant as the wife of George Valentine. It is now said by counsel that they did this because they supposed that George Valentine had been divorced from his first wife when he married the defendant. There is nothing to show that Mrs. Valentine knew there was any impediment to her marriage with Mr. Valentine until after his death.

It is the claim of complainant that, as Mr. Valentine had a lawful wife living when he married the defendant, their relations were illicit, and, when this illicit relation once exists, it is presumed to continue, and subsequent actual marriage will not be presumed from continued cohabitation and reputation after the legal impediment to enter into such a contract is removed: Citing *Rose v. Rose*, 67 Mich. 619, 35 N. W. 802; *Van Dusan v. Van Dusan*, 97 Mich. 70, 56 N. W. 234. An examination of *Rose v. Rose*, 67 Mich. 619, 35 N. W. 802, shows that the question arose between the parties to the alleged marriage contract, the one claiming that there was an agreement to marry, and the other denying it. In disposing of the case the court said that the testimony had been carefully reviewed, and failed to satisfy the court that any marriage was ever agreed upon. The court used the following language: "The complainant's bill, and her testimony relied upon to support it, present a sad exhibition of the indecencies and immoralities of these parties, and the continuance of which, through almost an entire generation, unpunished, <sup>341</sup> is now sought by the complainant to be made the basis of the most sacred of all contracts known to the law. A court of equity will never set its seal of confirmation to such baseness and immorality."

The case of *Van Dusan v. Van Dusan*, 97 Mich. 70, 56 N. W. 234, was also a case where one of the parties alleged that the marriage relation never existed. In disposing of the case, Justice Hooker said: "The evidence does not satisfy us that these parties ever availed themselves of the opportunity, offered them after the divorce was obtained, of changing their relation. Doubtless the complainant was willing, and we could wish that defendant had been honorable enough to grant her request; but it is not within our province to make a contract of marriage on account of commiseration for one or contempt for the other party, when the evidence does not show one to exist. We think the case within the principle of *Rose v. Rose*, 67 Mich. 619, 35 N. W. 802. We are therefore not disposed to disturb the decree of the circuit judge, who saw the witnesses, and, in our judgment, committed no error in dismissing the bill."

There is nothing in either of these cases to indicate that if, after the impediment to a lawful marriage between them had ceased, they had intended to take each other as husband and wife, and had indicated that intention by treating each other in all respects as though they were married, and had introduced each other as husband and wife, and had so held themselves out to the world, and had lived together as husband and wife, the court would not have held that the presumption that the illicit relation, which existed when they commenced to live with each other, continued after the impediment to their marriage ceased, was overcome.

In the case of *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245, the plaintiff married Mr. Blanchard when she had a former husband, Mr. Musgrave, living. Musgrave died in June, 1871. The plaintiff and Mr. Blanchard continued to live together as husband and wife until his death, in August, 1872. Mr. Blanchard introduced her <sup>342</sup> as his wife. He made a will in which he mentioned her as his wife. They lived happily, and in his last illness, which lasted about ten months, Mrs. Blanchard waited upon him, and treated him in all respects as a lady would treat her husband. She was recognized in the community as the wife of Mr. Blanchard, and was treated with respect. The court said: "Under these circumstances, even if the marriage were originally void, a subsequent marriage will be presumed to have occurred after the removal of all legal impediments by the death of Musgrave, in June, 1871."

1 Bishop on Marriage, Divorce, and Separation, sections 970, 975, states the rule as follows:



"Sec. 970. If the parties desire marriage, and do what they can to render their union matrimonial, yet one of them is under a disability, as where there is a prior marriage undissolved, their cohabitation, thus matrimonially meant, will, in matter of law, make them husband and wife from the moment when the disability is removed; and it is immaterial whether they knew of its existence or its removal or not, nor is this a question of evidence. This doctrine is overlooked in some of the cases, but it is abundantly sustained by others, and the reasoning on which it rests is conclusive. Here are the mutual present consent, to which not even written or spoken words are necessary, and consummation, which is useful in the proofs, but is not necessary—more, therefore, than the law requires."

"Sec. 975. Though a cohabitation was introduced by a formal ceremony of marriage, and the parties erroneously supposed the impediment of a former marriage to have been taken away, and never had their mistake corrected, still, in localities where formal solemnization is not essential, valid marriage may be presumed to have occurred after the impediment was removed. To employ words more nicely accurate, and cover a larger ground, the living together of marriageable parties a single day as married, they meaning marriage, and the law requiring only mutual consent, makes them husband and wife, for here are all the elements of a contract of present matrimony."

<sup>343</sup> In section 979 the author gives instances: "Where a woman had formally married, believing her husband to be dead, and, on his returning, still continued to cohabit under the second marriage, and kept it up for several years after he really died, a second marriage after such death was presumed. And in another case, where a married man, knowing his wife to be alive, entered into a form of marriage with another woman, who did not know of the impediment, and continued the cohabitation under this second marriage until after the death of the first wife, a marriage after such death was inferred": See, also, *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *United States v. Hays*, 20 Fed. 710; *White v. White*, 82 Cal. 427, 23 Pac. 276; *Yates v. Houston*, 3 Tex. 433; *North v. North*, 1 Barb. Ch. 241, 43 Am. Dec. 778.

The legal impediment to a marriage between these parties, if it had not been removed before, was removed by the death of Ida Valentine, in October, 1889. The parties after that date resided and cohabited together. Mr. Valentine applied for in-

surance, in which he declared he was married, and named his beneficiary, Margaret I. Valentine, his wife. They were regarded and treated by their relatives and neighbors as husband and wife. Mr. Valentine was a carpenter by trade. He was ill for a long time before his death. The testimony is that Mrs. Valentine treated him kindly, gave him his medicine, and did all those things a wife would be expected to do for her husband. She took in boarders, and applied the proceeds to his support as well as her own. No question was raised after the death of Ida Valentine but that Margaret Valentine and George Valentine were husband and wife until his death seven years after the legal impediment to their marriage had ceased to exist. Under such circumstances their marriage must be presumed: *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Peet v. Peet*, 52 Mich. 464, 18 N. W. 220; *Flanagan v. Flanagan*, 116 Mich. 185, 74 N. W. 460; *People v. Mendenhall*, <sup>344</sup> 119 Mich. 404, 75 Am. St. Rep. 408, 78 N. W. 325; *Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609.

The decree is affirmed, with costs.

The other justices concurred.

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**Common-law Marriage.**—If a man and woman are formally married when one of them is under a disability, and, after the removal of the disability, they continue to live together as husband and wife, such cohabitation constitutes a common-law marriage: *Schuchart v. Schuchart*, 61 Kan. 597, 78 Am. St. Rep. 342, 60 Pac. 311.

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## PEOPLE v. MARSH.

[125 Mich. 410, 84 N. W. 472.]

**PARDONS—CONVICTION—EXCEPTIONS BEFORE SENTENCE.**—Where the governor is authorized by the constitution to grant pardons after conviction, a pardon may be granted after conviction and before sentence while a review by the supreme court is pending on exceptions, as the acceptance of the pardon by the defendant is an admission of guilt and a waiver of his exceptions.

**PARDONS—ADVISORY BOARD—POWER OF GOVERNOR.** Where the statute makes no such requirement, the creation of an advisory board of pardons does not require all petitions for pardon to be presented to and acted upon by such board before the governor can exercise executive clemency.

**PARDONS—CONDITIONAL—POWER OF GOVERNOR.**—Under a constitutional authority to grant pardons upon such conditions as he may think proper, the governor may lawfully issue a

pardon upon the condition that the convicted person shall pay a certain sum of money to the state to reimburse it for the expenses incurred in his trial.

John J. Speed and F. A. Baker, for the motion.

Horace M. Oren, attorney general, Arthur J. Tuttle, prosecuting attorney, and Edward Cahill, contra.

<sup>411</sup> MOORE, J. April 5, 1900, the respondent was convicted in the circuit court for the county of Ingham of the crime of being an accessory and of aiding and abetting William L. White, quartermaster general of this state, in the crime of fraud and embezzlement in said office. Before sentence, but after conviction in the circuit court, the respondent brought his case into this court by a bill of exceptions. While the case was still pending in this court, the governor issued a pardon to the respondent, the material part of which, so far as this discussion is concerned, reads as follows:

"Now, therefore, know ye that I, Hazen S. Pingree, governor as aforesaid, by virtue of the power and authority in me vested, do hereby pardon the said Arthur F. Marsh of and from the offense whereof he was convicted as aforesaid. On condition, however, that said Arthur F. Marsh pay into the treasury of Ingham county, in the state of Michigan, for the purpose of reimbursing the said county of Ingham for the expense incurred in his prosecution, the sum of one thousand dollars on the first day of January, A. D. 1901; one thousand dollars the first day of January, A. D. 1902; one thousand dollars on the first day of January, A. D. 1903; one <sup>412</sup> thousand dollars on the first day of January, A. D. 1904; and one thousand dollars on the first day of January, A. D. 1905—a total sum of five thousand dollars.

"And provided, further, that should said county of Ingham for any reason decline to receive said sums of money to be so paid, the same shall be paid into the state treasury of the state of Michigan.

"This pardon is to take immediate effect."

After this pardon was issued the respondent called the attention of the court to its issuance, and filed a certified copy of it with the court. He asks the court for an order remitting the record to the circuit court for the county of Ingham, with directions to that court to refrain from entering any judgment or sentence upon the conviction, and to discharge the respondent and his sureties upon any recognizance he may have given.



The people, through the attorney general and the prosecuting attorney for Ingham county, oppose this action for the following reasons: 1. The said pardon is void for the reason that it does not indicate and set forth that the application therefor was referred to, investigated or passed upon, or a recommendation made thereon by, the advisory board in the matter of pardons; 2. Said pardon is void for the reason that, under the constitution and laws of this state, the governor of the state has no authority to grant a conditional pardon prior to the pronouncement of sentence, where the condition imposed is not a condition precedent to the taking effect of the pardon; 3. Said pardon is void because the conditions embodied therein are not enforceable.

Section 11, article 5, of the constitution of the state provides that the governor "may grant reprieves, commutations, and pardons after convictions, for all offenses, except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to regulations provided by law relative to the manner of applying for pardons."

413 The important question in this case is, Has there been a conviction of the respondent, within the meaning of the constitution, so that executive clemency may be invoked? It is urged that, before the governor can exercise the pardoning power, there must be a sentence of court as well as a conviction. A like question was involved in the case of *Commonwealth v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699. In that case the respondent was indicted for cheating by false pretenses. He was tried and convicted. He removed his case to the supreme court by entering therein a bill of exceptions. While the case was still pending, he was pardoned by the governor. He then came into the superior court, and pleaded his pardon, and asked to be discharged. The attorney for the commonwealth contended, as is contended here, that the governor cannot pardon until conviction is established by the judgment of the court upon a verdict of guilty. The opinion in the case is written by Justice Gray. It is a very learned and exhaustive discussion of the question involved. A reference to that opinion will answer the purpose of this discussion better than an attempt to restate the law. He cites many instances where the pardoning power has been invoked after conviction, and while the case was pending in the court of review. In the course of the discussion he uses this language: "It was argued for the commonwealth that

the defendant could not be said to be convicted at the time when this pardon was granted, because a bill of exceptions was then pending in this court to the rulings under which he had been found guilty, and that, after pleading the pardon, he might still prosecute his exceptions, and, if they should be sustained, have the verdict set aside. But it is within the election of the defendant whether he will avail himself of a pardon from the executive, be the pardon absolute or conditional. If he does not plead the pardon at the first opportunity, he waives all benefit of the pardon. If he does so plead it, he waives all other grounds of defense: *Staunf. St. P. C. & Pr.* 150; *Kelyng*, 25; 4 *Blackstone's Commentaries*, 402; *United States v. Wilson*, 7 *Pet.* 150. The pleading of the pardon in the superior court would therefore be ipso facto a waiver of <sup>414</sup> his exceptions. A still more conclusive answer to this objection is that at the time of the adoption of the constitution, and for many years afterward, no bill of exceptions was permitted by law. It was first given to the rulings of a justice of this court by the Statutes of 1804, chapter 105, section 5, and to the rulings of the court of common pleas by the Statutes of 1820, chapter 79, section 5. The providing by the legislature of a new form of presenting questions of law to the court does not make the verdict of a jury, so long as it stands, less than a 'conviction,' and cannot abridge the prerogative of the executive under the constitution: *Ex parte Garland*, 4 *Wall.* 333, 380."

The case of *Manlove v. State*, 153 *Ind.* 80, 53 *N. E.* 385, is in point upon this feature of the case, as well as upon another, which will appear later. *Manlove* was convicted of seduction, and sentenced to a reformatory. He appealed the case to the supreme court. The attorney general moved to dismiss the appeal because the respondent had married the complaining witness, and had accepted the pardon of the governor. The respondent opposed this motion, and insisted he was entitled to the opinion of the court of review, because that part of the judgment of the court below which assessed a fine and costs against him remained in force. The court held that the fine and costs were part of the judgment, which was based upon a verdict of guilty. The court then adds: "The assignments of error challenge the correctness of the judgment as an entirety. On a new trial appellant might interpose his pardon and his marriage: *State v. Otis*, 135 *Ind.* 267, 34 *N. E.* 954. It would be beyond the power of the state to force him to meet the information on its merits. The substantial element of the controversy has been eliminated. . . . The question of appellant's

liability to fine and costs cannot be reached except by overturning the judgment as a whole. He may not so attack the judgment, because, by asking and accepting executive clemency, he said, in effect, that he was rightly convicted. He may not admit guilt to escape imprisonment, and at the same time protest innocence to avoid payment of fine and costs."

Applying the principles of law stated in these cases to <sup>415</sup> the case before us, what is the result? When Mr. Marsh petitioned the governor for a pardon, and it was issued to him, and he brought it into this court, he, in effect, said he was guilty of the offense charged, that the conviction of the court below ought to stand, and that he waived the bill of exceptions filed by him in this court. This situation practically disposes of the case in this court.

The counsel, however, have raised the question of the validity of the pardon, they have argued it fully upon both sides, and desire us to pass upon it. If not decided now, as the question may arise later we will express our views thereon, without attempting to enter upon an elaborate discussion. We do not deem it necessary to decide whether the legislature possesses the power to require all petitions for pardon to be presented and acted upon by the advisory board of pardons before the governor can exercise executive clemency. It is sufficient for the purposes of this case that no such requirement is made by the statute: See *In re Pardoning Power of Governor and Council*, 85 Me. 547, 27 Atl. 463. The constitution provides the governor may grant pardons upon such conditions, and with such restrictions and limitations, as he may think proper, etc. It is possible to conceive of a condition that might void the pardon, because it was unlawful; but it is not unlawful to make it one of the conditions of the pardon that the convicted person shall pay to the commonwealth a sum that will in part, at least, reimburse it for the expenses incurred in bringing about his conviction. When the convicted person accepts the pardon, he accepts it subject to its conditions and limitations: *Flavell's Case*, 8 Watts & S. 197; *Lee v. Murphy*, 22 Gratt. 789, 12 Am. Rep. 563; *In re Wells*, 18 How. 307; *In re Marks*, 64 Cal. 29, 49 Am. Rep. 684, 28 Pac. 109; *Manlove v. State*, 153 Ind. 80, 53 N. E. 385. See *People v. Moore*, 62 Mich. 503, 29 N. W. 80, and cases there cited.

We have no doubt the pardon is valid, and has become <sup>416</sup> operative, subject to be defeated by a breach of the conditions contained therein.



The appeal is dismissed, and the cause is remanded to the circuit court for the county of Ingham.

The other justices concurred.

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**Pardon.**—If the governor is authorized to grant pardons after conviction, he may pardon after verdict and judgment, but pending an appeal by the prisoner: *State v. Alexander*, 76 N. C. 231, 22 Am. Rep. 675; *Commonwealth v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699. A conditional pardon may be granted: *Fuller v. State*, 122 Ala. 32, 82 Am. St. Rep. 17, 26 South. 146.

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## DETROIT CITIZENS' STREET RAILWAY COMPANY v. COMMON COUNCIL OF DETROIT.

[125 Mich. 673, 85 N. W. 96.]

**CORPORATIONS—FRANCHISES.**—Corporate franchises are of three classes: 1. The right to organize and exist; 2. The right to act generally; and 3. The special privileges which are not possessed by individuals under general laws.

**TAXATION—CORPORATIONS—FRANCHISES.**—The rights to organize, exist, and act generally as a corporation, while franchises are not transferable and have no cash value within the meaning of the tax law.

**TAXATION—CORPORATIONS.—SPECIAL PRIVILEGES** granted to a corporation may have a cash value in connection with the tangible property with which they are used, within the meaning of the tax law.

**TAXATION.—THE GOODWILL OF A BUSINESS** is not taxable.

**TAXATION—STREET RAILWAYS—TRACKS.**—Under a statute providing that the track of a street railway company shall be assessed as personal property, the term "track" includes not only the ties, spikes, rails, and switches, but also the right to use the bed upon which they are placed.

**TAXATION—STREET RAILWAYS—ASSESSMENT AS UNIT—FRANCHISE.**—The tangible property of a street railway company may be assessed as a unit, and the location of its easement and tracks as to environment, and the period that it may lawfully use it, and other exceptional privileges inseparably connected with it, may be considered in determining the value of such property.

**TAXATION—STREET RAILWAYS—FRANCHISES—STATUTE.**—The franchise of a street railway company, although not made taxable property by express statute, may be taxed indirectly by associating it with tangible property, thereby increasing the valuation of the latter, since property should be taxed at its cash value, whatever it may be that causes the value.

**TAXATION—CORPORATIONS—DOUBLE TAXATION—CONSTITUTIONALITY.**—A statute relating to the assessment of

corporations, which provides that the value of the stock less the real estate, and the cash value of all personal property less bona fide indebtedness, are assessable as personal property, is void as providing for double taxation, and as lacking uniformity with the usual method.

**TAXATION—CORPORATIONS—EFFECT OF UNCONSTITUTIONAL STATUTE.**—Where a statute, which provides especially for the assessment of corporations, is unconstitutional, corporate property is to be assessed according to the general provisions of law relating to the assessment of property.

**TAXATION—STREET RAILWAYS—TANGIBLE PROPERTY—EJUSDEM GENERIS.**—The fact that a statute provides for the taxation of tangible property alone will not, under the doctrine of ejusdem generis, prevent the taxation of tangible property to the amount of its enhanced value, where such value has been added by reason of its association, and use in connection with intangible property.

**TAXATION—STREET RAILWAYS—ASSESSMENT AS UNIT—DIFFERENT TAXING DISTRICTS.**—The fact that a street railway system has several power plants situated at different places along its line, which extends into several taxing districts, one of which is outside the city, with which the city board of assessors has nothing to do, is no obstacle in the way of an assessment of such property as a unit, since the legislature has power to require different portions to be assessed in different places, and there is nothing to prevent a fair division of the value of the property by a mutual understanding between the several officers, if not in some other way.

**CORPORATIONS—SPECIAL LAWS—LEGISLATIVE POWER.**—While private corporations can be created under general laws only, the legislature may grant privileges to them by special laws in any case that it might do the same to individuals.

**TAXATION—CORPORATIONS—SPECIAL LAWS.—THE LEGISLATURE** may by special act impose specific taxes upon corporations, or it may authorize cities to do the same.

**TAXATION—STREET RAILWAY CORPORATIONS—CONTRACT WITH CITY.**—Where by charter a city is empowered to lay specific taxes upon street railway corporations, the city may make a contract with such corporations fixing the rate of city taxation which will be binding on the city and which will relieve such corporations from paying their share of the general tax for city purposes.

**TAXATION—IMMUNITY FROM—ASSIGNABILITY—STREET RAILWAYS.**—The right of immunity from general local taxation, which a street railway company has by reason of a contract with a city, is assignable under a statute allowing such corporations to purchase and use other street railways, and to enjoy all the rights and privileges of such companies, the same as they might have done.

**TAXATION—FRANCHISES—ASSESSMENT—MENTAL PROCESS.**—While an assessment placed on a naked street railway franchise, disassociated from the tangible personal property, and irrespective of the cash value of the whole, may be invalid, yet the mental processes by which the assessors ascertained the value of the plant are immaterial, if they finally concluded the property was honestly worth in cash the sum assessed.

**TAXATION—CONTESTING ASSESSMENT—WAIVING TECHNICALITIES.**—Where a street railway company contests its

assessment before the board of assessors and, upon appeal, before the city council, upon the merits, it cannot, after an adverse decision, file a second appeal which sets up purely technical defenses.

Brennan, Donnelly & Van De Mark, Henry M. Duffield, H. H. Hatch, and John J. Speed, of counsel for the relator.

T. E. Tarsney, Allen B. Morse, and George E. Nichols, for the respondent.

<sup>676</sup> HOOKER, J. The relator is a corporation organized and operating a street railway trolley line in the city of Detroit. Its railway extends through several wards in the city, and into a township outside of the city. The assessment of values of property for taxation in Detroit is made by a city board, called the "board of assessors," its <sup>677</sup> action being subject to review by the common council. This board assessed the relator's property for the year 1900 at something over \$5,000,000, its previous assessment having been \$800,000 for the year 1898, and \$1,500,000 for the year 1899; and the council, professing to act as a board of review, subsequently confirmed the assessment. On May 14, 1900, the relator filed a petition for mandamus in the circuit court, in which it prayed that the respondent, the common council, be required to strike the assessment from the rolls, or, in the alternative, that it be required to reconvene as a board of review, and strike from said assessment certain sums alleged to represent the value placed upon the franchises of the relator, and to place upon the rolls the personal property of the petitioner at the actual cash value of its tangible personal property subject to taxation. On the return of an order to show cause, issue was joined upon several questions of fact, and, after hearing the testimony, that court, sitting en banc, denied the relief prayed, and the relator has brought the case here.

The circuit court filed written findings of fact, based upon the issues, and an opinion discussing said findings and the law applicable to the case. Four objections only, made by relator's protest filed with the board of assessors, were relied upon in the circuit court, as appears from the opinion: "1. That the valuation placed on relator's taxable personal property greatly exceeds its true cash value; 2. That there was illegally included in said valuation several million dollars on account of franchises; 3. That no separation was made on the assessment-roll of the valuation placed on the franchises and the valuation placed on the tangible personal property of relator; 4. That the property acquired by relator from the Grand River Street



Railway Company is taxable, by virtue of a contract with the city, at one per cent on its gross earnings, and is not otherwise subject to taxation for city purposes."

**678** The circuit court omitted to determine the first, i. e., whether the valuation exceeded the cash value of the property, upon the ground that a court can only assume to control the judgment of an assessing officer in fixing values where said officer has acted fraudulently.

The disposition of the second is shown by the following question: "In fixing the valuation of the personal property of the petitioner, did the board of assessors take into consideration and include the franchises of petitioner, and easements in the nature of franchises, in the streets of Detroit, acquired by petitioner from the Detroit City Railway, and owned and enjoyed by petitioner, as alleged in paragraph 8 of the petition?" The court answered: "Yes; they took into consideration the franchise in the streets of Detroit, as stated in the opinion."

Referring to the opinion for a more complete answer, we find it stated that "the franchise which was taken into consideration in valuing relator's personal property was its right to construct, maintain, and operate street railways in the streets of Detroit, and to collect fares from passengers carried thereon."

It appears to be conceded that there was no separation upon the roll of the valuation placed upon the franchises from that placed upon the tangible personal property, and that the property was assessed at some \$2,000,000 more than the value of the track, rolling stock, etc., disassociated from the easement in the highway, and its attendant privileges.

For the purpose of the discussion of the question before us, we will treat franchises as of three classes: 1. The right to organize and exist as a corporation; 2. The right to act generally as a corporation; and 3. The special privileges granted to it which are not possessed by the individual under general laws: See *Chicago Municipal Gas Light etc. Co. v. Lake*, 130 Ill. 42, 43, 22 N. E. 616.

**679** The first of these is enjoyed by all corporations legally formed, and also by all assuming to be corporations through user. This right to exist as a corporation is not transferable, and, therefore, cannot be said to have a cash value, in the sense of our statute: *Joy v. Jackson etc. Plank-Road Co.*, 11 Mich. 164. Cash value and actual value are said to have the same meaning, viz., "the amount at which property would be esti-

mated if taken in payment of a liquidated demand due from a solvent debtor": Welty on Assessments, sec. 130, and cases cited. The term is fixed, however, by our statute (1 Comp. Laws 1897, sec. 3850), which provides: "The words 'cash value,' whenever used in this act, shall be held to mean the usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale."

Apparently the intention was not to tax property having no cash value. If it were transferable, it would seldom be worth more than a nominal price, by reason of the facility with which such corporations may be organized under our general laws, which is the only way that private corporations can be created in Michigan: Const., art. 15, sec. 1.

Again, franchises of the second class are incident to all corporations, and are manifestly of no more value than the right to exist, for they naturally and impliedly go with it, and are not transferable. Every corporation has, by implication, authority to acquire and dispose of property, and to carry on business as a private person would do, for the purposes for which the corporation is organized: *Joy v. Jackson etc. Plank-Road Co.*, 11 Mich. 164; *Stone v. Farmers' etc. Trust Co.*, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388.

The third class consists of exceptional privileges—usually, if not always, connected with property—which the citizens generally do not enjoy, and these are frequently of much value. To apply what has been said to the relator: Any number of street railway companies <sup>680</sup> might be organized under the statute, and they would have the right to exist as lawfully constituted corporations, with the corporate capacity to build and operate street railways anywhere in the state. But the right to build would have to be acquired. Until such a corporation should be able to obtain an easement in some highway—which the statute does not, of itself, effectuate—its privileges would be of little, if any, value. But when it should have acquired possession of an easement in a designated highway, for the purposes of a street railway, and constructed and put in operation a railway thereon, the easement and railroad would constitute property.

It seems not to have been the policy of the state to place any price or tax upon the right to exist or act as a corporation until recently. Now a franchise tax is exacted from all newly formed domestic corporations, as well as those of foreign state, and

countries, which choose to do business within the state. This is in no sense a tax upon property. It is exacted but once, viz., when the company is organized or enters the state to do business, and, in short, is a condition upon which it is permitted to be and to act. The price of these privileges is proportionate to the capital employed. Whether the state might treat these franchises as property, and provide for their assessment on an ad valorem basis, we need not inquire. It has not been done, and there seems to be little inducement for such action, because of the trifling value of the abstract right of corporate existence.

Recurring to the third class, it is noticeable and suggestive that the state has not, in express and certain language, imposed a tax upon franchises as property upon an ad valorem basis. We are of the opinion that the reason is that there is no occasion for it. A fundamental idea in our organic law is equality of taxation. It requires uniformity of method, and prescribes the basis upon which property shall be taxed, viz., "its cash value." There is no more excuse for ascribing a fictitious value to property, whether tangible or intangible, than there is justice in <sup>681</sup> undervaluing or omitting it from the tax-roll. We have attempted to show that special privileges are usually of little more than nominal value, except in connection with tangible property which makes it possible for the owner—who may be a corporation or a natural person—to avail himself of them. Why, then, should they be taxed in the abstract, and when the owner can neither use them nor sell them? In *California v. Central Pac. R. R. Co.*, 127 U. S. 1, 8 Sup. Ct. Rep. 1073, it is said: "The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose, or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present case."

When, however, they are associated with property which makes them available, the property with which they are connected generally takes on a new form in the law, and is enhanced by the privileges and uses to which it is adapted and applied, and



pays a correspondingly increased tax, because it has an increased cash value. Any other rule would be full of difficulty.

Private corporations are formed for an indefinite variety of purposes, and the fewest of them enjoy exceptional privileges, beyond that of corporate existence. There is no reason for assessing the factory of a manufacturing corporation, the store of a mercantile company, or the farms of an agricultural corporation, at a greater sum than similar property belonging to a private person is valued at. The problem is solved by assessing the property of each at its true cash value. Special privileges, unlike the right to corporate existence, have an actual value in connection with the property adapted to their use, and are salable with it: See *Joy v. Plank-Road Co.*, 11 Mich. 164; 2 682 Comp. Laws 1897, secs. 6426, 6448, 6449. The practice of taxing the property and the privilege together is nearly or quite uniform. It would be unjust to tax the property at its enhanced value, and also tax the franchise separately, upon some speculative value, arrived at upon the basis of real or imaginary expectancy of profits. Low taxes, fairly and evenly distributed, should be the aim, and the constitution has fixed the rule of valuation at the "cash value," and, as we have seen, the statute has defined the term.

The relator contends that the personal property should be assessed upon the basis of the component parts of the railway system, i. e., a given price per mile for track and overhead construction, an average sum per car, and a certain sum for machinery, all bearing some relation to their cost or the price at which similar articles can be obtained. In fact, the relator claimed upon the hearing below that the tangible property was so valued, and that some \$2,000,000, or more, was then added for the value of the franchise. The court set the matter at rest, however, by finding that, in fixing the value of the personal property, the assessors took into consideration and included the franchise in the streets. The right to use the street for a railway is an easement: *Detroit Citizens' St. R. Co. v. Detroit*, 124 Mich. 449, 83 N. W. 104; *Providence Gas Co. v. Thurber*, 2 R. I. 15, 55 Am. Dec. 621; *People v. Cassity*, 46 N. Y. 49; *Grand Haven v. Grand Haven Water Works*, 119 Mich. 655, 78 N. W. 890; *Rascher v. East Detroit Ry. Co.*, 90 Mich. 413, 30 Am. St. Rep. 447, 51 N. W. 463. This easement becomes a vested property right, and, while there may be a few cases holding that easements not held in fee cannot be separated from the fee for the purposes of taxation: See *Fall River v. County*

Commrs. of Bristol, 125 Mass. 567; *Detroit v. Detroit City R. Co.*, 76 Mich. 427, 43 N. W. 447, there are others which hold such an interest taxable as real estate, and the section cited (1 Comp. Laws 1897, sec. 3850), defining the term "cash value," also provides that "in determining the value the <sup>683</sup> assessor shall also consider the advantages and disadvantages of location, quality of soil, quantity, and value of standing timber, water power, and privileges, mines, minerals, quarries, or other valuable deposits known to be available therein, and their value."

If, therefore, the easement were taxable as an interest in land, the nature of the easement, its location, uses, and productiveness, might, by the express terms of the statute, be taken into consideration in determining the cash value. The individuality of the elements of the road as chattels, i. e., spikes, rails, ties, poles, wire, etc., has become lost, as in other cases of fixtures, by being transformed into other property, the value of which is to be determined by relation to that kind of property, and not to spikes, ties, rails, etc., just as fine furniture is valued by comparison with similar articles, and not with similar materials to those entering into its construction.

It is obvious that the relator's property is worth much more as a street railway, equipped and in successful operation, than the elements which enter into its construction would be as second-hand railway material. It may be worth much more than what it would cost to reproduce the physical aggregation of property constituting such railway and its equipment, and circumstances might exist which would make it worth less. The propriety of treating aggregations of property as a unit is as natural and proper for the purposes of assessment as for sale, and this is especially so where the various articles are so essential to the purpose for which they are combined that the withdrawal of one or any class would destroy, or substantially impair, the use of all for the purposes to which in their new form they are adapted.

We may take judicial notice that the relator's street railway has a large market value, much in excess of any amount that could be obtained for the same if it were to be dismantled, and its rails, cars, motors, wire, etc., sold separately. In such a case, it would practically go as junk. Again, the easement of a steam railroad in a continuous <sup>684</sup> right of way through the state, over a desirable route, and in use, has a much greater value than the same kind of a right not in use, or in small, disconnected parcels, or in a remote region, where it cannot be used

profitably. Manufacturing establishments and large buildings, favorably located and adapted to special uses, illustrate the same principle, and we think it is incorrect to say that the recognition of this principle, and its consideration in assessment, is taxing the goodwill of a business, which, like executory contracts, has not usually been thought to be taxable: *People v. Dederick*, 161 N. Y. 195, 55 N. E. 927; *Chittenden v. Witbeck*, 50 Mich. 401, 15 N. W. 526.

The legislature has provided that the track (whatever that may mean) shall be assessed as personal property. In our opinion, this term should be construed to include not only the ties, spikes, rails, and switches, but also the right to use the bed upon which they are placed: See *Detroit v. Detroit City R. Co.*, 76 Mich. 428, 43 N. W. 447. And although the bed, i. e., the highway, is under the control of the public, and the right to use it is an easement and interest in land, the state may treat it as personal property for assessment, even if it would be otherwise considered real estate—a proposition that we find it unnecessary to assert.

No good reason is suggested for assessing a street railway, or any other property, for less than it would readily sell for. This railroad has for years been assessed for a sum small in comparison with the assessment complained of, but if it be true that former assessments have not included the track, and have been based solely upon the value of certain items of construction, such assessments may have been much too low. The propriety of assessing such property as an entirety is well supported by authority. Mr. Elliott, in his work on Railroads, advocates it in the following language: "The best method of taxing the property of a railroad company, forming part of its line and used in the operation <sup>685</sup> of its road, is by regarding it as a unit, and assessing the property as an entirety, since any other method would dissect the property into fragmentary parts, and lead to confusion and injustice. Some of the courts hold that the property can only be taxed as an entirety": 2 Elliott on Railroads, sec. 737, and note.

This subject was discussed in *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 220, 17 Sup. Ct. Rep. 305. That case was complicated by questions relating to interstate commerce, the corporate business extending into and over several states. Yet the court asserted the propriety of taxation by the states, and admitted the power to assess as a unit, and to levy taxes upon an aliquot part of such assessment valuation. The case



is valuable also upon the question which we have before alluded to, viz., the elements which go to make up the aggregate value of the unit, and the doctrine was carried much further than is necessary in this case by applying it to an express company, which owned no easements, and had no special privileges that any private citizen does not enjoy, and whose only property consisted of articles in common use by individuals, but which, treated as a unit, were susceptible of being made the means of realizing enormous profits, and probably, as a whole, worth in the market much more than the integral parts of such unit, for the purpose of sale. Whatever may be thought of the effect of this case upon the right to tax the goodwill of a business, or the ability of the owner of property to use it to extraordinary advantage, which we find it unnecessary to approve, we consider it a strong support to the doctrine that the tangible property of a street railway company may be assessed as a unit, and that the location of its easement and tracks as to environment, and the period that it may lawfully use it, and other exceptional privileges inseparably connected with it, may be considered in determining the value of such property; or, in other words, the assessor must not eliminate them by making reductions in the clear value of the entire plant. Unlike the goodwill of a merchant <sup>686</sup> which is ephemeral, these are part and portion of the right to make any use of the property for the purpose to which, in its new form, it is adapted. Its value may be increased much or little, depending upon the opportunity for using it, just as the value of a modern sawmill may depend upon the presence or absence of accessible timber.

Mr. Justice Cooley, in his work on Taxation, intimates the same opinion as that quoted from Elliott. He says: "The difficulties of assessing lines of railroad, which extend through many municipalities, in the same way that property in general is assessed, are so great and so obvious that in many states it is not attempted, and a franchise tax is imposed as a substitute for all other taxation. But in other states a railroad is listed, assessed, and valued as an entirety, and the value then apportioned for taxation between the several municipalities by some standard prescribed by law, which generally is the length of line within the municipalities respectively. There is no constitutional objection to that method of taxing this species of property, and it is, perhaps, more just than any other. In some states, the assessing board apportions the aggregate value between the municipalities according to the estimated value of that portion

of the road, with its improvements, lying within the limits of each; and in still others, the roadbed, right of way, and superstructure, are assessed as a whole, while the buildings and local improvements are left to be assessed locally, like the property of natural persons. . . . Where a road is thus to be assessed as a whole, bridges, tunnels, easements in and over streets, and other things and rights of a like nature, are to be taken into account, and are not subjects of separate assessment; while property not held or used for railroad purposes, but of which the corporation may have become owner, should be separately listed and taxed, unless the statute plainly makes a different provision. . . . In other states still, the local assessors are left to list and value such railroad property as is within their jurisdiction, including such portion of the roadbed and superstructure as lies within their municipality, in the same manner as they would any other property. In valuing railroad property, it must be estimated by the same standards as other property is valued by": Cooley on Taxation, 2d ed., 383.

<sup>687</sup> In *Louisville etc. R. R. Co. v. Bate*, 12 Lea, 581, it was held that the roadbed, franchise, and superstructure of railroads are so essentially intermingled, and each so indispensable to the value of the others, that they should be assessed together. This is under a statute declaring that "the roadbed, rolling stock, franchise, etc., shall be known as distributable property, and may account for the remark in the case of *Street R. R. Co. v. Morrow*, 87 Tenn. 406, 11 S. W. 348, that "the franchise to be a corporation is property, and as such must be assessed." It is noticeable that this case, which in this respect goes further than we find it necessary to do, holds that privileges ought to be assessed with the tangible property, and adds: "Here it has been assessed along with a valuable easement—an interest in realty." We are in accord with the conclusion, and, had the court said that the exceptional privileges, instead of the right to be a corporation, were to be considered property, and taxed, we might think it correct, even had the franchise been separately assessed under the statute of Tennessee directing the assessment of franchises as property. In *Street R. R. Co. v. Morrow*, 87 Tenn. 406, 11 S. W. 348, the franchise was assessed with the easement, and this was sustained, though it was said that "it would have been better to have assessed these elements of value with the iron rails, ties, spikes, etc., as together constituting so much street railway."

The case of *Chicago City R. Co. v. Chicago*, 90 Ill. 573, 32 Am. Rep. 54, holds that the easement in the streets, which had

been granted (though not in fee), and by which the company had acquired rights in the street which no other person or company nor the public possessed, was taxable.

In *Rascher v. East Detroit etc. Ry. Co.*, 90 Mich. 413, 51 N. W. 463, 30 Am. St. Rep. 447, it was said that the right of way of defendant was an easement.

In *Grand Haven v. Grand Haven Waterworks*, 119 Mich. 654, 78 N. W. 890, a tax upon waterpipe in the ground as personalty was held void, thereby <sup>688</sup> perhaps implying that it was an interest in land, and that the easement and its fixtures should be assessed together, if assessable at all.

In *Detroit Citizens' St. R. Co. v. Detroit*, 124 Mich. 449, 83 N. W. 104, it was held that a conveyance of an easement for a street railway was an interest in land: See cases there cited. It is none the less an interest in land because not a freehold interest, nor because the legislature may have expressly directed its assessment as personalty; nor should we infer from the latter fact that the track—i. e., the rails, ties, etc.—must be assessed separately, and that the easement cannot be taxed at all. We think the legislature had no such intention.

In *People v. Commissioners of Taxes of New York*, 23 Hun, 687, it is said: "A street railroad company cannot be taxed for its tunnels and bridges, but it may be taxed for the easement acquired on the streets, and the easement is to be assessed at its fair value, as a portion of a continuous railroad. The foundation columns and superstructure of an elevated railway are included in the words 'lands and real estate,' and are taxable as such; and, in assessing such foundations and superstructure, assessors are not confined to the consideration of the land covered thereby, but may consider their position, and the business and profits to be derived therefrom. An easement of a railroad upon lands, and its tracks and other appurtenances, are land, within the meaning of the statute relating to taxation, and are to be assessed at their par value, as a portion of a continuous railroad, extending beyond the city limits."

In the case of *Pittsburgh etc. R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. Rep. 1114, Mr. Justice Brewer quoted with approval the language used in *Franklin County v. Nashville etc. Ry. Co.*, 12 Lea, 521, to the effect that: "The value of the roadway at any given time is not the original cost, nor, a fortiori, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the



roadway, assessed at the market price of adjacent lands, and adding the <sup>689</sup> value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value for taxation of a railroad track can only be determined by looking to the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock."

Justice Brewer said further: "Counsel sought in argument to narrow the meaning of the words 'railroad track' and 'rolling stock,' as though the two did not include the entire railroad property; but, evidently, the supreme court of the state construed, and, as we think, properly, the two terms as embracing all which goes to make up what is strictly railroad property. . . . Obviously it was assumed by that court . . . that by these two descriptive terms the legislature, carrying out the declared purpose of subjecting all property within the state to taxation, not expressly exempted, meant to include all the property owned or used by the railroad companies in the operation of their roads, and which may fairly be called 'railroad property.' And when the statute provides that such property shall be assessed at its 'true cash value,' it means to require that it shall be assessed at the value which it has as used, and by reason of its use."

In *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. Rep. 876, it was said, quoting from Mr. Justice Miller, in *State Railroad Tax Cases*, 92 U. S. 608, 611: "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole. . . . This court has expressly held in two cases, where the road of a corporation ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation: In *re Delaware Railroad Tax*, 18 Wall. 206; *Erie R. R. Co. v. Pennsylvania*, 21 Wall. 492."

<sup>690</sup> The language of Fuller, C. J., in the case of *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. Rep. 305, is pointed in support of the propriety of assessing such property as a unit. He said: "No more reason is perceived

for limiting the valuation of the property of express companies to horses, wagons, and furniture than that of railroad, telegraph, and sleeping-car companies to roadbed, rails, and ties, poles and wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches, and furniture, the contracts for transportation facilities, the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value, in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others. We repeat that, while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case, resulting from the very nature of the business. . . . The property of an express company, distributed through different states, is as an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business. It is this which enabled the companies represented here to charge and receive within the state of Ohio for the year ending May 1, 1895, \$282,181, \$358,519, and \$275,446, respectively, on the basis, according to their respective returns, of \$42,065, \$28,438, and \$23,430, of personal property owned in that state—returns which confessedly do not, however, take into account contracts for transportation and accompanying facilities. Considered as distinct subjects of taxation, a horse is, indeed, a horse; a wagon, a wagon; a safe, a safe; a pouch, a pouch. But how is it that \$23,430 worth of horses, wagons, safes, and pouches produces \$275,446 in a single year, or \$28,438 worth, \$358,519? The answer is obvious. . . . 'Neither does the fact that the property of the express companies was valued as a unit profit-producing plant violate any federal restriction upon the taxing power of a state within which a part of that plant is found. The value of property depends, in a large degree, upon the use <sup>691</sup> to which it is put. If a railroad may be valued as a unit, rather than as a given number of acres of land, plus so many tons of rails, and so many thousand ties, and a certain number of depots, shops, etc., there is no sufficient reason why the property of an express company should not be treated as a unit plant.' . . . We are also unable to conclude that the classification of express companies with railroad and telegraph companies as

subject to the unit rule denies the equal protection of the laws. That provision in the fourteenth amendment 'was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways,' nor was that amendment 'intended to compel a state to adopt an iron rule of equal taxation.' . . . . Considering, as we do, that the unit rule may be applied to express companies without disregarding any other federal restriction, we think it necessarily follows that this law is not open to the objection of denying the equal protection of the laws."

Mr. Justice Brewer, in *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185, 17 Sup. Ct. Rep. 604, thus pungently shows the justice of the assessment of the unit inclusive of the intangible rights which swell the value of tangible articles which enter into the property. He said: "Whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon be the separate pieces of tangible property? . . . . To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other; while they who own tangible property, not organized into a single, producing plant, will feel the injustice of a system which so misplaces the burden of taxation. . . . What a mockery of substantial justice it would be for a corporation <sup>602</sup> whose property is worth to its stockholders, for the purposes of income and sale, \$16,800,000, to be adjudged liable for taxation upon only one-fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income or for purposes of sale": See, also, *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis. 329, 52 N. W. 439; *Yellow River Imp. Co. v. County of Wood*, 81 Wis. 554, 51 N. W. 1004; *Western*



Union Tel. Co. v. Attorney General of Massachusetts, 125 U. S. 530, 8 Sup. Ct. Rep. 961; State v. Anderson, 90 Wis. 550, 63 N. W. 746. Other cases are also cited in the briefs of counsel.

The authorities are substantially uniform in support of the propriety of assessing public utilities, such as railroads, water-works, telegraph lines, etc., as units. It is contended, however, that if a franchise—i. e., an intangible license to do an exceptional business—is not made taxable property by express statute, it cannot be taxed indirectly by associating it with tangible property, thereby increasing the valuation of the latter. We think otherwise, and think it clear that property should be taxable at its cash value, whatever it may be that causes the value. If, as is claimed, this property is worth, and would bring, with the franchises that are inseparable from and necessarily go with it, somewhere from ten to fifteen million dollars, its owners have no right to expect it to be taxed on a basis of one and one-half million dollars; and we feel confident that the legislature never contemplated a construction of the tax law that should justify it. Whether the property <sup>693</sup> is worth such a sum is not for us to decide. That question is for the assessors and board of review, and, as held by the learned circuit judges, their determination cannot be disturbed, if regular and not fraudulent.

We have endeavored to show that, whatever may be the rule as to the assessment of privileges in the abstract, not connected with tangible property, the latter may be assessed for what it is worth, without reference to the cause of such value, and without analysis to see if some intangible element of value does not enter into it, which should be eliminated upon the theory that intangible things are not taxable. We have shown that this court has held that "the right to use the tracks is inseparable from the franchises, and, it not being taxable as land, it should properly be taxed as an entirety to the corporation in one place": *Detroit v. Detroit City R. Co.*, 76 Mich. 428, 43 N. W. 447. It would seem that we might treat this case as decisive upon the question of assessing as a unit both the track and the privileges of making exceptional use of the highway.

We will, however, take up the subject of our statutes, which are alleged to preclude the idea that franchises may be treated as property for the purposes of assessment. Attention has already been called to the provision that property shall be assessed at its true cash value; and we have intimated our opinion that the right to be a corporation, and the possession of

the incidental and necessary functions of corporations, were not designed to be taxed, because they have no cash value under the statute, if for no other reason. We have not found it necessary to hold that a naked right to avail itself of exceptional privileges was taxable as corporate property. We do not pass upon that question. We have also referred to the statute which expressly recognizes the principle that the environment of property may affect its value. We may, at this point, mention the claim of counsel that the relator was entitled to be informed of the items of the valuation. If the property was to be assessed as a unit, there was no obligation to put separate values on the elements.

694 Section 3831 of 1 Compiled Laws of 1897 provides that, "for the purposes of taxation, personal property shall include." Then follows in sixteen subdivisions the description of various kinds of property, and subdivision 13 is as follows: "All other personal property not herein enumerated, and not especially exempted by law." It is contended: 1. That franchises are not expressly mentioned, and that we should apply the doctrine of *ejusdem generis*, and consider them excluded, because the section mentions only tangible property; 2. That provision is made by section 3842 for the taxation of corporate property in another way; and 3. If section 3842 shall be found invalid, it is evident that it was not the intention of the legislature to tax corporate franchises under section 3831, and therefore these franchises cannot be taxed at all.

We are satisfied that section 3842 is unconstitutional and void, because it provides for doubly taxing the property of corporations. As shown by the opinion of the circuit judges, the value of the stock less the real estate was assessable, and the cash value of all personal property, less bona fide indebtedness, was assessable. If there should be no real estate and no debts, the entire property of a corporation would be taxed twice, as personal estate; and if there were real estate, all of the property would be taxed twice, part as real estate and part as personal property, if there were no debts. Again, the provision for deducting debts from personal property would be invalid because not uniform with the usual method of deducting debts, viz., from credits only. We cannot, however, sustain the claim that franchises cannot add to value because of the suggestion that the intention was to tax under section 3842, and not under section 3831. Section 3842 shows an intention to tax corporations upon all property covered by section 3831. There is no

intimation that anything was to be omitted. It prescribed a method for ascertaining the amount at which a company should be assessed. That method failing, the assessor is left to the general provisions, or the property cannot be assessed at <sup>695</sup> all. No one seems to have claimed the latter effect of the invalidity of the statute. We are satisfied that the property of the relator is taxable under section 3831.

Now, as to the doctrine of *ejusdem generis*. Some kinds of property called intangible are taxable—such as contract rights of annuity, royalty, credits of every kind. There is ground for the argument that every kind of property that has a cash value is taxable under subdivision 13 of section 3831, and that intangible property is not excluded, some of these other kinds of intangible property being included. But there are many other kinds of intangible property—such as rights of action, and of contracts executory in character—that have never been supposed to be taxable. Some of these have a purely speculative value, and some are more certainly valuable. These, like the right to exist as a corporation, are not taxable. It may be that we should say the same of naked privileges, if it were necessary to decide the question. But tangible property is taxable, and the intangible rights of use and location may increase its value for the purposes of taxation. Such seems the consensus of opinion in other states, and such seems to have been the understanding of the legislature, as appears from section 3850, if there is anything in analogy.

Having determined that there is nothing to prevent property of this character from being assessed as a unit, we should inquire whether there is any reason peculiar to this particular property to prevent it. It is urged that a practical construction has been given to the tax law, and that it has not been the custom in this state to tax property as a unit, and to permit privileges and franchises to enhance its value. We do not so understand the fact. We have supposed that manufacturing institutions, electric and gas lighting companies, and water-works were taxed at their full cash value, and that the right to use the mains, poles, wires, etc., in the streets was included, as without these the value would be comparatively small. In further support of the claim that the <sup>696</sup> franchises should be included, see *State Board of Assessors v. Central R. Co.*, 48 N. J. L. 146, 278, 4 Atl. 578; *Belleville Nail Co. v. People*, 98 Ill. 399; *Fall v. Mayor etc. of Marysville*, 19 Cal. 391; *Central Pac. R. R. Co. v. State Board of Equalization*, 60 Cal. 35; *Fond*



du Lac Water Co. v. Fond du Lac, 82 Wis. 322, 52 N. W. 439. We understand it to be conceded by at least one of the briefs for relator that "this license or easement in the streets is inseparably connected with the track, etc., of the company, and neither it nor the track can be assessed separately, but must be valued together": Citing State v. Anderson, 90 Wis. 550, 63 N. W. 746; Detroit v. Detroit City R. Co., 76 Mich. 428, 43 N. W. 447; People v. Mutual Gaslight Co. of Detroit, 38 Mich. 155.

It is suggested that there are insuperable obstacles in the way of an assessment of this property as a unit, inasmuch as the street railway system consists of several power plants, situated at different places along the line, which extends through or into several taxing districts; and, although the assessments are made by the city board of assessors for most of these, there is one that is outside of the city, with which this board has nothing to do. While it is true that a more satisfactory and just method would be to have the entire property assessed and apportioned among the districts by one board, this is not indispensable. The legislature has power to require different portions to be assessed in different places, and there is nothing to prevent a fair division of the value of the property by a mutual understanding between the several officers, if not in some other way. In the case of Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. Rep. 305, a board in the state of Ohio placed a valuation upon corporate property as a unit, although the property was not all within that state, and took an aliquot part of this as a basis for assessment. If Ohio could lawfully do that, so could Pennsylvania, and Virginia, and Kentucky; and it would seem no more difficult in the case before us than in that instance.

697 Another reason given for the claim that at least a portion of this property was not subject to this assessment rests upon an ordinance of the city of Detroit. It arises upon the fourth objection, already stated, viz., that the Grand River Street Railway Company, to whose rights the relator has succeeded, is taxable, under a contract with the city, at the rate of one per cent on its gross earnings, and that this is in lieu of all other taxes for city purposes. There is nothing in this which does away with the necessity of valuing the property, as it is necessary for the purposes of state and county taxes: Detroit v. Detroit City R. Co., 76 Mich. 425, 43 N. W. 447; but the question is likely to arise upon an attempt being made to spread or collect the city tax, and, as it is discussed, we dispose of it here.

To understand the question, we must advert to the history of the transaction. We take this mainly from the relator's brief. On August 26, 1868, a number of persons organized a corporation under an act then in the statutes known as the "Tram railway act" (see 2 Comp. Laws 1897, sec. 6394 et seq.), and called it the "Grand River Street Railway." In November, 1868, the common council of the city of Detroit passed an ordinance granting to the Grand River Street Railway some privileges and rights. Section 4 provided that the railway should keep certain portions of the streets in good order and repair, and free from snow, ice, etc., and, inferentially at least, required it to pave the same. Section 22 required it to pay annually to the city treasurer, after the expiration of five years, fifteen dollars on each car used, "to be collected as a license for the use of the city." This remained in force until November 14, 1879. At the time of the organization, and when the ordinance was passed, the tram railway act provided for the payment of a specific tax of one-half of one per cent of the paid-up capital stock, to be in lieu of all other taxes. This was payable to the state. There was a similar provision in the street railway law passed in 1867. Both were repealed in 1882. By reason of this the city could collect no tax while that provision <sup>698</sup> continued in force, except the license mentioned in the ordinance, which we understand to have been paid without objection; but in 1879 a conference between the company and a committee of the council was held, and a report was made by the committee, with a proposed ordinance, which was afterward passed. It was as follows: "In lieu of license fee and tax and of the existing charges for paving and street supervision, the company should pay into the city treasury a specific tax of one per cent per annum on their gross receipts, and should pay the entire cost of materials for, as well as the cost of, excavating, grading, and paving, renewing, repairing, and cleaning the roadway spaces which constitute their track, as the council might require, reserving to the company the right to use on the surface of their roadways either cobblestone or some similar durable and proper materials."

After the repeal of the specific tax provision of the tram railway law, in 1882, the city undertook to impose ad valorem taxes upon the company in addition to the one per cent provided by the ordinance, and litigation followed, which continued until a new ordinance was passed and accepted, reading as follows: "From the first day of July, 1882, to the thirty-first day of De-

ember, 1896, said railway shall pay to the city treasurer one and one-half per cent of its gross receipts. From the first day of January, 1897, to the end of its franchise under the ordinance approved November 14, 1879, said railway shall pay to the city treasurer two per cent of its gross receipts. At the expiration of each half year during the entire period above mentioned, the treasurer of said railway shall submit to the city treasurer a sworn statement of such gross receipts, and shall therewith pay to the city treasurer the percentage so found to be due."

This was complied with until 1888, when, under the advice of counsel, the city attempted to levy an ad valorem tax, upon the claim that the ordinance of 1879 and the amendment adopted in 1887 were ultra vires. The same claim is made now by the respondent in answer to relator's assertion that the only tax that the city is <sup>699</sup> entitled to must rest upon the agreement contained in the ordinance in this case, as changed in 1885. In the circuit court the respondent's claim was sustained, upon the ground that the city had no power to exempt the relator from taxation, or to tax it upon a different basis than that upon which other property is taxed, and that it had no power to impose a specific tax on property which the general laws of the state subject to an ad valorem tax, and that it could not lawfully exempt from taxation the franchise of one street railway, and tax that of another.

The exact question before us appears to be, Was it lawful for the city to make a contract fixing the rate of city taxation which should be binding upon the city, after the repeal of the specific tax imposed by the tram railway law, and be efficacious to relieve the street railway from paying its share of the general tax for city purposes? Counsel for the relator contend that its authority to do so is settled by the decision upon this or a similar ordinance in the case of *Detroit v. Detroit City R. Co.*, 76 Mich. 421, 43 N. W. 447, while the circuit court was of the opinion that the question is not necessarily concluded by that case, and that what was then said upon the subject of the validity of such agreements was obiter, because the court decided only that the city could not tax under the ordinance and also under the general law. The opinion in that case shows that the tax upon the basis of the ordinance amounted to six thousand two hundred and fifty dollars and forty cents, and the company had made payment on the earnings for the first half of the year, leaving a little over three thousand dollars due for the entire year. The



tax assessed under the general law was about one thousand dollars less than the aggregate for the year upon the basis of percentage upon earnings. It was the opinion of the learned circuit judges that the only question decided was that the city was not entitled to both taxes, and that only that question should be considered to be concluded. Their opinion seems to rest upon the proposition that, as the constitution forbids the creation of private corporations by any other than general laws, it also forbids the imposition <sup>700</sup> of different specific taxes upon corporations similarly situated, and organized under the same general law, and that the city of Detroit could not discriminate between its street railway lines, by taxing one and exempting another to any degree, but that the same rule must apply to all. An examination of the record in that case shows that it was an action of debt brought by the city to recover taxes claimed to be due. The first count claimed something over six thousand dollars under the general law. The second count was for a tax levied under the ordinance. The circuit court held that the law repealing the state specific tax was constitutional, and hence the property of tram roads was thereby turned over for taxation under the general tax law, and that the ordinance of 1879, declared upon, had been repealed by a later one passed in 1887, and hence there could be no recovery upon that count. The city took no judgment for either tax, although it might seem that it was entitled to one or the other, and upon appeal the judgment was affirmed. In disposing of the case, this court showed that section 22 of the organic act imposed a specific tax upon all corporations that might be organized under it, while by section 34 it was provided that no such company should construct a railway in any street, "without the consent of the municipal authorities of such town or city, and under such regulations, and upon such terms and conditions, as said authorities may from time to time prescribe; provided, further, that after such consent shall have been given, and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining, and operating such railway in the street in such consent or grant named, pursuant to the terms thereof."

The opinion states further that various arrangements were made from time to time between the city and the company, and in November, 1879, a new agreement was <sup>701</sup> made, whereby

it was agreed, among other things, that the defendant should pay a yearly tax of one per cent upon its gross receipts, and do certain paving, and that "this special tax and paving liability should be in lieu of license and other taxes and paving charges." In 1882 section 22 of the organic act, providing for the specific tax was repealed, and, disputes arising over an attempt to apply the general tax law to the defendant, a new agreement was made in 1887, whereby it was agreed that one and one-half per cent should be paid for a time, and later two per cent, upon gross receipts, in lieu of all taxes, license fees, and charges. If the general law was in force as to city taxes against the defendant, the agreement of 1887 was void, and nothing was in the way to prevent this court from reversing the case upon the ground that the city was entitled, under admitted facts, to a judgment for such taxes upon an ad valorem basis, under the general law and first count. But it did not do that. It denied relief altogether; and while it was distinctly held that the law of 1882 was constitutional, and therefore repealed the state specific tax, it was also said that, since that law was passed, the parties had compromised their rights, and agreed upon another sum that should be paid in lieu of all assessable taxes, and that this could not be recovered, because the declaration counted on the earlier and different ordinance of 1879, which was repealed by the agreement of 1887. We are unable to see how this result could be reached, if the repeal of section 22 in 1882 abrogated an existing ordinance. It seems to us that the logical and necessary inference is that the ordinance was a binding contract, still in force. To our minds, there is no difficulty in this. The legislature has, unless prohibited by constitutional restrictions, full power to pass special laws, and always had. The only limitation asserted is the provision, that private corporations can be created under general laws only. But being created under general laws, the legislature may grant privileges to them by special law in any <sup>702</sup> case that it might do the same to individuals, unless some constitutional provision, not cited, precludes it.

Again, it may impose specific taxes upon corporations. That has generally been done by the organic act, and therefore by general law. A spirit of fairness might seem to require uniformity in such tax between all corporations organized under a general law; but the corporations being created, what is in the way of imposing specific taxes upon each according to the circumstances attending each? The legislature is authorized to impose specific taxes. It may do so or not, as it deems best. It

may authorize cities to do so, and has done so in nearly every city or village charter heretofore granted: *Kitson v. Mayor etc. of Ann Arbor*, 26 Mich. 325; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654. The organic act under which this street railway was organized compelled it to submit to such terms in regard to local taxation as it should be able to make with the city: See *Detroit v. Detroit City R. Co.*, 76 Mich. 421, 43 N. W. 447. And every other street railway was obliged to do the same. This was a general law, but it left the city to impose or omit a special tax in each particular case as it should see fit. That may or may not have been wise. It is not a question of wisdom, but of power. When the city saw fit to make its easements and local taxes the subject of contract, the agreement bound both parties, and there is no reason for requiring the private corporation to live up to every provision of the contract, and permitting the municipal corporation to disregard it at will. Such contract was made, and is as binding as though made by the legislature itself. The railway company has paid the tax stipulated for, and been to a large expense in paving, etc., under the contract. The abolition of a special tax and the passage of a general tax law have not changed the contract. At least, this was the view we understand to have been taken in the case of *Detroit v. Detroit City R. Co.*, 76 Mich. 421, 43 N. W. 447, which we think is conclusive of the question: *Cooley on Taxation*, 2d ed., 66. That, in the absence <sup>703</sup> of constitutional prohibition, the legislature has unlimited power, does not admit of doubt: See *Atlantic etc. Ry. Co. v. Lesueur (Ariz.)*, 19 Pac. 157. The respondent must be content to measure its city taxes by the terms of its contract.

It is contended that this immunity from taxation was not assignable with the property of the Grand River Railway Company; but we think this position untenable. The statute permits an assignment, and all rights resting in contract are included. Section 15 of the street railway law provides: "Any street railway company may also purchase and acquire, either at public or private sale, whether judicial or otherwise, or may hire, any street railway in any city, village, or township, owned by any other corporation or company, together with all the real and personal estate belonging thereto, and the rights, privileges, and franchises thereof, and may use, maintain, and complete such road, and may use and enjoy the rights, privileges, and franchises of such company, the same, and upon the same terms, as the company whose road and franchises were so acquired might



have done. Every street railway company may also purchase, hold, own, or take upon lease such real estate, barns, stables, buildings, fixtures, and property as may be necessary for the use and business of their road; and the whole or any part thereof, together with their railway, fixtures, property, and appurtenances, rights, privileges, and franchises, may sell, lease, dispose of, pledge, or mortgage, whenever the corporation shall deem it expedient so to do": 2 Comp. Laws 1897, sec. 6448.

We now approach a question of fact, viz., Was the intangible personal property (i. e., the franchise) assessed with the tangible property, and, if so, did such assessment include the first two classes of franchises? An issue was framed upon this subject, and the finding shows that the franchise to construct, maintain, and operate the railway, and to collect fares, was taken into consideration in valuing relator's personal property. There is testimony which supports this finding; for while Hally testifies that, in considering the subject, an estimate was placed on several <sup>704</sup> items of property, and also upon the franchises, the board finally adopted an aggregate sum which should include all. He was asked: "Mr. Hutchins stated, if I recollect his testimony correctly, that, in his talks with you, you refused to separate or give them the franchise valuations and valuations of the different pieces of property and kinds at the times they were there. What was said about that? A. Why, I did refuse. My testimony is simply that I had placed—that we had placed—the assessment against each one of the companies as a unit, and had taken into consideration the trackage and overhead system and rolling stock and machinery and power-house plant and the franchise, in making the assessment, and that the sum total represented the value that we had placed upon the whole of it."

This finding of fact is final. The case, being here by certiorari, is not to be tried de novo; nor can the finding be set aside unless it clearly appears to be unsupported by the evidence: *Dove v. Independent School Dist.*, 41 Iowa, 689; *Oden-dahl v. Russell*, 86 Iowa, 669, 53 N. W. 336; *Independent Dist. No. 2 v. Rhodes*, 88 Iowa, 570, 55 N. W. 524; *People v. Waynesville*, 88 Ill. 469; *People v. Albright*, 14 Abb. Pr. 305.

Much stress is laid upon the fact that the assessment closely approximates the aggregate of certain items (one of which was franchises, \$2,000,000) which were made and reported by a commission appointed, as we understand it, by the council, to ascertain the value of the property with a view to its purchase

by some one, which figures and report were before the assessors and considered by them. It is insisted that we must find that this was the actual assessment, although these items were combined in the roll finally. If the question were not concluded by the finding, and if we could say that the aggregate contained an assessment placed on the naked franchise, disassociated from the tangible personal property, and irrespective of the cash value of the whole, we might be justified in treating it as an improper assessment, and although made in <sup>705</sup> good faith, a legal fraud. But we are not to hastily treat mental processes as assessments, and if the assessors could be said to have estimated the franchise separately, taking into account its duration and its profitableness, to ascertain the value of the plant, it does not necessarily invalidate the assessment. Perhaps no two of the assessors reached the result by the same process, but that is not material, if they finally concluded that the property was honestly worth in the market, in cash, the sum assessed.

Complaint is made that the assessors refused to specify to relator separate values upon the franchise and the tangible property, or to tell how they reached the conclusion arrived at by them. There seems to have been no misunderstanding between the parties as to what property was being assessed. Both knew it was the street railway plant, and relator knew that the board claimed that the privileges should increase the value of the tangible property. It had hearings before the board and a committee of the council, acting under orders from the council in the matter of review. It was told that the board had been advised that the franchise could not be separately assessed. It is significant that there is no evidence called to our attention that this tangible property, in connection with the privileges that belong to it, and which would be sold with it, is worth less than the amount at which it was assessed. No offer was made to produce such proof before either board, and we have no reason for saying that the property was overvalued, unless we should sustain relator's contention that intangible values should be eliminated altogether. We think this assessment should not be set aside merely because an effort may have been made by some one to separate tangible and intangible values—a thing that was unnecessary, and one that was harmless, provided, as already stated, the board really did reach the conclusion that the property was worth and would bring in cash the sum adopted.

There is another branch of this case which we must yet <sup>700</sup> consider, viz., whether the proceeding was void for irregularity. The claim is made that there are several fatal defects in the proceedings. They are as follows:

"The assessment-roll was not completed by the board of assessors on the first Tuesday of April.

"No assessment had been made against the street railway companies on or before the third Tuesday of April.

"No opportunity was given them on or before the third Tuesday of April to see or learn what their respective assessments were.

"No legal hearing was given them by the board of assessors, sitting as a board of review.

"No hearing on its appeal was given relator by the common council, sitting as a board of review.

"The hearing given relator by the common council was not a hearing of its appeal by the common council as prescribed by statute.

"The circuit court could not lawfully refuse to pass upon the grounds set up in the so-called supplemental appeal of relator from the action of the board of assessors.

"The assessment is void because fraudulently and knowingly excessive, and because the judgment of the assessors was never brought to bear upon the value of the relator's property, and because the assessors failed and refused to separate the tangible from the intangible personal property of relator."

The common council of Detroit is the board of review, and an appeal was taken from the assessment made by the board of assessors, on April 18th, upon grounds stated in relator's protest filed with the board of assessors. In conformity to its usual practice, the council referred the matter to its committee to investigate and report. Relator appeared before the committee and was heard on several occasions, without objection, and afterward the committee made a report to the council upon the relator's assessment, which was adopted. On the eighth day of May, the relator addressed to the council a claim of further appeal, for several additional reasons and grounds. If these points were called to the attention of the board of assessors, the proof has escaped our observation. They were not included in the original protest. It is stated that <sup>707</sup> they were not filed with the council until after the hearings before the committee were concluded, and on the same evening that the committee's report was adopted. The circuit court held that this



supplemental appeal should not be considered. The city charter (section 168) provides for the appeal, and contains the following: "Every appeal shall be in writing, and shall state specially the grounds of the appeal and the matter complained of, and no other matter shall be considered."

It appears that the relator ascertained the amount of its assessment, and contested it repeatedly before the board of assessors and the committee of the board of review. It raised none of these alleged jurisdictional questions now said to be fatal, but rested and relied upon the four points contained in its protest. After all of these hearings, if not after the report of the committee, it filed a paper claiming another appeal upon the ground of alleged technical irregularities. These were not considered, and we agree with the circuit court that they were not entitled to consideration. Relator had raised the meritorious questions, and its rights were in a situation to be secured upon review if the council dealt unjustly with it; but it had waived the technical ones. Assessment and collection of taxes is a matter of so much detail that absolute accuracy is impossible, and the statute (1 Comp. Laws 1897, sec. 3922) attempts to protect the public against irregularities that do not prejudice, and the courts recognize the validity of this legislation. "The party alleging error must show error to his prejudice": *Louden v. East Saginaw*, 41 Mich. 18, 2 N. W. 182. "Irregularities in assessment, when not prejudicial to protestant, give no right to recovery": *White v. Millbrook*, 60 Mich. 532, 27 N. W. 674. See, also, *Stockle v. Silsbee*, 41 Mich. 615, 2 N. W. 900; *Wright v. Dunham*, 13 Mich. 414; *Bird v. Perkins*, 33 Mich. 28; *Wilt v. Cutler*, 38 Mich. 189; *Auditor General v. Sparrow*, 116 Mich. 574, 74 N. W. 881; *Auditor General v. Keweenaw Assn.*, 107 Mich. 405, 65 N. W. 288.

<sup>708</sup> Counsel contend that their rights have been violated in this: "1. That, after the assessment against the relator was made, it was denied the right of review before the board of assessors; 2. That the relator was denied an opportunity to be heard by the common council upon the appeals taken by it to that body."

They insist that the method adopted, of not filling out the roll until after the amounts of assessments were fixed by the board of review, was not a compliance with the law, and consequently they were denied the right of review before the board of assessors. We think the method adopted was not a compliance with the law, and there is no reason why the board should not have a completed roll at the time prescribed: See

**Common Council of Three Rivers v. Smith**, 99 Mich. 510, 58 N. W. 481. But we think this is not fatal in this case. The relator understood the situation, and had an opportunity to be heard as effectively as though the roll had been finished and present. Had these questions been raised seasonably, there might be more merit in this contention. It is as though the relator had not appeared before the board of review: See **Caledonia v. Rose**, 94 Mich. 216, 53 N. W. 927. We think the roll was in existence, to all intents and purposes, so far as the questions raised before the board of assessors are concerned: **Auditor General v. Ayer**, 122 Mich. 136, 80 N. W. 997.

Whether a second appeal was allowable or not, the council was justified in treating it as abandoned. It is possible that the relator had a right to be heard before the council upon the subject of its first appeal, for it cannot delegate the power of final determination; but it was not required to notify the relator when to attend. This report was filed May 8th. Presumably, it embodies all contests that had arisen. Several persons who had appealed were heard by the council that night. The relator contented itself with sending a paper to be filed, expressing a desire to be heard <sup>709</sup> upon the matter, and also upon a further appeal. If it desired to be heard, it should have been present and asked to be heard. Relator has not been denied due process of law. It has had its opportunity to be heard upon every meritorious question that it has raised: **Attorney General v. Jochim**, 99 Mich. 371, 41 Am. St. Rep. 606, 58 N. W. 611; **Rouse v. Wayne Circuit Judge**, 104 Mich. 234, 53 Am. St. Rep. 457, 62 N. W. 359.

As foreshadowed by what has been said, the order of the circuit court denying the writ of mandamus must be affirmed.

The other justices concurred.

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**Taxation.**—A franchise as property is liable to taxation according to its value: **Mayor v. Baltimore etc. R. R. Co.**, 6 Gill, 288, 48 Am. Dec. 531; note to **Attorney General v. Bay State Min. Co.**, 96 Am. Dec. 720.

As to Whether Railways are to be taxed as an entirety, see **Applegate v. Ernst**, 3 Bush, 648, 96 Am. Dec. 272; monographic note to **New Albany v. Meekin**, 56 Am. Dec. 525.

**Corporations.**—On special and hostile legislation directed toward corporations, see the monographic note to **St. Louis etc. Ry. Co. v. Paul**, 62 Am. St. Rep. 165-182.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MISSISSIPPI.**

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**STATE v. McDANIEL.**  
[78 Miss. 1, 27 South. 994.]

**FALSE IMPRISONMENT—WANT OF JURISDICTION.**—An officer who, without jurisdiction, causes to be arrested without a warrant, and who fines and imprisons, a person who has committed no offense in his presence, is liable in an action for false imprisonment.

**OFFICERS—LIABILITY OF SURETIES.**—For false imprisonment, of which their principal is guilty, the sureties on his official bond are answerable.

Action against the mayor of a village and the sureties on his official bond to recover damages for his illegal act in causing the arrest, without a warrant, of a person on a charge of cruelty to animals, not committed in the mayor's presence, and without affidavit having been made, fining and committing the accused to prison without a trial. Judgment on demurrer for the defendant, and the plaintiff appealed.

Hartfield & McLaurin, for the appellant.

Hardy & Howell, for the appellees.

<sup>3</sup> WHITFIELD, C. J. On the authority of *Bigham v. State*, 59 Miss. 529, and *Wilcox v. Williamson*, 61 Miss. 310, the appellee McDaniel must be held liable. In *Grove v. Van Duyn*, given at length in 42 Am. Rep. 648-650, note, Chief Justice Beasley, speaking for the court, while declaring that "the jurisdictional test as the measure of judicial responsibility should be rejected," yet said <sup>4</sup> that the magistrate would be liable on an-



other ground in a case like this, saying (page 650): "It would be no legal answer for the magistrate to assert that he had a general cognizance over criminal offenses, for the conclusive reply would be that the particular case was not, by any form of proceeding, put under his authority." What the magistrate does *colore officii*, his sureties are liable for. They are not liable, by the terms of their bond, for independent wrongs committed by the magistrate acting wholly as an individual and not at all *colore officii*. The acts of this magistrate here in question were done *colore officii*, and not at all as an individual. He was not acting, nor purporting to act, in any mere individual capacity, as any private citizen would be. He expressly claimed to be acting as mayor, in the exercise of official authority as such, and it is plain that this is the true character of his acts. His action was in excess of his jurisdiction; or, at all events, he had no authority to try that particular case, except in the manner required by law; but, nevertheless, what he did was done *colore officii*, and his sureties are liable.

We approve the reasoning in the cases of *Clancy v. Kenworthy*, 74 Iowa, 740, 35 N. W. 427, and *Turner v. Sisson*, 137 Mass. 191, cited in the note to *McLendon v. State*, 92 Tenn. 520, 22 S. W. 200. Says the court in 74 Iowa, at page 743 (35 N. W. 428): "But it is insisted that, as the constable is shown to have had no lawful authority to arrest plaintiff, his act was, therefore, not done in the line of his duty. In truth his act was in the line (direction) of official duty, but was illegal because it was in excess of his duty. In the discharge of official functions he violated his duty and oppressed the plaintiff. This is all there is of it. If, in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and, for that reason, are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or <sup>5</sup> wrongs. For lawful acts in the discharge of his duty he, of course, is not liable. It follows that, if defendant's position be sound, no action can be maintained upon the bond in any case."

Say the court in *Turner v. Sisson*, 137 Mass. 191, 192: "By an official act is not meant a lawful act of the officer in the service of process. If so, the sureties would never be responsible. It means any act done by the officer in his official capacity, under color and by virtue of his office": See, also, *State v. Flinn*, 3 Blackf. 72, 23 Am. Dec. 380, and especially *Brown v.*

Weaver, 76 Miss. 7, 23 South. 388, as reported in 71 Am. St. Rep. 512, and the note thereto.

We think the sureties are liable: Murfree on Sheriffs, sec. 60.

Judgment is reversed, demurrer overruled, and cause remanded.

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**False Imprisonment.**—That an officer may be liable for causing the arrest of a person without warrant or process, see the monographic note to Tryon v. Pingree, 67 Am. St. Rep. 415. Consult, also, Bergeron v. Peyton, 106 Wis. 377, 80 Am. St. Rep. 33, 82 N. W. 291; Fkumoto v. Marsh, 130 Cal. 66, 80 Am. St. Rep. 73, 62 Pac. 303, 509.

On the Liability of Sureties on Official Bonds for unauthorized arrests by their principals, see the monographic notes to State v. Timmons, 78 Am. St. Rep. 420-425; Brown v. Weaver, 71 Am. St. Rep. 519-522.

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## CANTON COTTON WAREHOUSE COMPANY v. POOL.

[78 Miss. 147, 28 South. 823.]

**MASTER AND SERVANT—LIABILITY FOR INDEPENDENT TORTS.**—A master is not liable for the independent tortious acts of his servants, committed with his machinery, but not done in his business nor in the course of the employment of his servants.

**MASTER AND SERVANT—LIABILITY FOR PRACTICAL JOKE.**—A master is not liable for the results of a practical joke committed by his servants on a stranger, wholly outside the course of their employment.

Action to recover for personal injury resulting from a practical joke. Defendant, appellant here, was engaged in manufacturing ice, the plant being operated at night and lighted by electricity. Plaintiff, appellee here, and two companions, all country boys, met an old acquaintance employed by the defendant as night watchman. The latter invited them to inspect the plant. Before the inspection began the watchman related to the boys some marvelous effects produced by the explosion of a boiler in the plant some time previously. During the tour of inspection, and while all of the parties were in the engine-room, the watchman, or a confederate, turned off the electric lights and allowed a vast amount of steam to escape from the boiler. This alarmed the plaintiff, who, thinking that the boiler was exploding, made a hasty exit through an open door, and falling struck his head upon an iron rail, causing the injury complained of. Verdict and judgment for plaintiff, and defendant appealed.

W. H. Powell, A. K. Foot, and Mayes & Harris, for the appellant.

Christman & Howell, for the appellee.

**155** WHITFIELD, C. J. The act done here was not the act of the master. It was not done in the master's business, but was an enterprise wholly disconnected therefrom, done exclusively on their own account by the employés, for the highly reprehensible purpose of playing a practical joke. It very clearly appears that though the implements used were those of the company, used in certain ways in the making of ice, they were in this act not used as they would be in the making of ice. The slamming of the coal-scoop on the iron stairs, and the shutting off of steam, usually self-regulating by the automatic air pump, the turning out of the electric lights, and the yelling of the voices were not modes of making ice, but were a use solely for a mischievous purpose of those engaged in it, and in no sense an act done in the master's business. The case is wholly different from *Richberger v. American Express Co.*, 73 Miss. 161, 55 Am. St. Rep. 522, 18 South. 922. There *Richberger* was in the express company's office, transacting express business. The agent was refunding him an **156** overcharge, and taking a receipt therefor, and "immediately" upon the signing of the receipt, so that there could be no logical separation of what he did in the assault from the transaction of the express business, committed the assault. The appellee here was engaged in no business with the appellant, buying no ice. No employé of appellant was engaged in transacting any business of his master's with appellee. The acts done in the perpetration of this practical joke were wholly out of the line of their employment. That the appellee has no cause of action against appellant is made plain by the authorities collected in the exhaustive note to *Ritchie v. Waller*, 63 Conn. 155, 38 Am. St. Rep. 361, 28 Atl. 29, and by *Illinois Cent. R. R. Co. v. Latham*, 72 Miss. 32, 16 South. 757; and see specially *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 136, 21 Am. Rep. 597; *Bowler v. O'Connell*, 162 Mass. 319, 44 Am. St. Rep. 359, 38 N. E. 498; *Smith v. New York Cent. etc. R. R. Co.*, 78 Hun, 524, 29 N. Y. Supp. 540. In *Bowler's* case, the court say: "An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not the master's act." This is said to be too broad a statement of the law, at page 164, 27 L. R. A., in the note re-



ferred to, because it does not provide for the "misuse of a dangerous machine, as in *Texas etc. Ry. Co. v. Scoville*, 62 Fed. 730, 10 C. C. A. 479," a case relied on by appellant, affirmed by a divided court. But manifestly this is not a case like cases where the question is as to the custody of dangerous implements, as steam-engines, dynamite, torpedoes, etc. The ordinary appliances in use in an ice factory cannot be so classed, certainly not a coal-scoop and electric lights. The true test is very clearly stated in *Smith v. New York Cent. etc. R. R. Co.*, 78 Hun, 524, 29 N. Y. Supp. 540, a torpedo case. Says the court: "If by doing what he did he went outside of his employment in order to effect a purpose of his own, in exploding the torpedoes for his own amusement and not for the purpose of signaling the train, then the company would not be liable."

<sup>157</sup> The inquiry is not whether the act in question in any case was done, so far as time is concerned, while the servant is engaged in the master's business, nor as to the mode or manner of doing it, whether in doing the act he uses the appliances of the master, but whether, from the nature of the act itself as actually done, it was an act done in the master's business or wholly disconnected therefrom by the servant, not as servant, but as an individual on his own account. In the light of these principles it is clear there was nothing to go to the jury, and the peremptory charge asked by the defendant should have been given.

Reversed and remanded.

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**A Master is not Liable for the Acts of his Servant** where he departs from the employment for purposes of his own, even though he may at the time be making use of the master's implements which have been intrusted to him in the business: See the monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71-93.

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### KIRBY v. STATE.

[78 Miss. 175, 28 South. 846.]

**JUDGE—DISQUALIFICATION OF.**—The fact that the presiding judge was district attorney, and as such drew the indictment upon which the defendant was tried, does not disqualify the judge from presiding in the case, under a statute prohibiting a judge to preside in any case wherein he may have been of counsel.

Indictment and trial for murder. The accused objected to the presiding judge, on the ground that he was disqualified

from sitting, because he had formerly been district attorney, and as such had drawn the indictment upon which the accused was on trial. The objection was overruled and the accused appealed.

W. B. Ricks, for the appellant.

M. McClurg, attorney general, for the state.

<sup>178</sup> CALHOON, J. This case is presented for appellant with marked ability by counsel appointed by the court, who deserves all credit for his unremunerated services and laborious and intelligent research, on account of which we regret we cannot concur with him. The accused had every possible point made for him in the court below and here. Code of 1892, section 919, prohibits a judge to preside where he is of kin to any party to the cause, or interested in it, or "wherein he may have been of counsel." Does the word "counsel" include a district attorney who has had no further interest in the case than simply to draw the statutory indictment? This is the only question in this record worthy of consideration or insisted on. A district attorney need not be, and ought never to be, in the grand jury room, unless invited to be there by the grand jury for information "in a case in order that the same may be presented in the manner required by law": Code 1892, sec. 1556. He need not draw or even sign an indictment: *Keithler v. State*, 10 Smedes & M. 192. <sup>179</sup> If it is duly presented in open court and marked "Filed" by the clerk, it is enough. We have no such statute as that of Texas, the decision under which is relied on by appellant. With us the district attorney "appears and prosecutes for the state" when there is arrest made and proceedings commenced under the indictment. Because one may be the general counsel for the state or a private person cannot disqualify him from presiding in a case in which he was not actually of counsel, did not advise, and was ignorant of the facts, as we must presume in the case at bar. If it had been shown that the judge, as district attorney, had heard the facts and advised and drawn the bill, a very different case would be before us.

The record shows a deliberate murder for robbery, and no error is found in it, after the most careful examination. Execution of the sentence is set for Saturday, January 5, 1901, between 11 o'clock A. M. and 4 o'clock P. M., in the manner and at the place as prescribed by law.

Affirmed.

**Disqualified Judge.**—Acting as advocate and giving counsel in a matter is good cause of disqualification of a judge, in a case arising out of such matter after his appointment as judge: *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

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## ALABAMA AND VICKSBURG RY. CO. v. WILLIAMS.

[78 Miss. 209, 28 South. 853.]

**ILLEGITIMATES—CONSTRUCTION OF STATUTES RESPECTING.**—The rule that statutes making innovations on the common law must be strictly construed applies to statutes conferring rights on illegitimate children.

**ILLEGITIMATES.—THE WORD "CHILDREN" used in a statute does not include illegitimates.**

**PARENT AND CHILD—ILLEGITIMATES—RIGHT TO RECOVER FOR INJURY TO.**—Statutory rights of action given kindred for injuries do not embrace illegitimate kindred, without express mention.

**ILLEGITIMATES.**—The mother of a bastard cannot sue for injury to him.

**ILLEGITIMATES.—THE MOTHER of a bastard cannot inherit from him.**

Action by a mother to recover from a railway company for the negligent killing of her illegitimate son. Judgment for plaintiff. Defendant appealed.

McWillie & Thompson, for the appellant.

T. McKnight and A. J. McLaurin, for the appellee.

**214 CALHOON, J.** There is no reason for overruling the case of *Illinois etc. R. R. Co. v. Johnson*, 77 Miss. 727, 28 South. 753, and the conclusion reached in that case should be the same in this. At the common law an illegitimate could not inherit from his own mother or anyone else, and he could not transmit by inheritance, except to the heirs of his own body. He might become the propositus of a new line of descent from himself, but, until a child was born to him in wedlock, he had no kindred—no father, no mother, no sister, no brother—and nothing which he did not acquire. All kinship was denied, and no blood connection recognized, except that the courts, for the actual protection of his life as a person in the body politic, would ascertain the natural mother, and, for the conservation of the morals and decencies of society, would look



into his natural blood kinship in vindicating the statutes against incest. Statutes denouncing penalties reached him, as they did all other persons, but statutes could not be availed of which would improve his condition, unless they expressly included illegitimates in their terms. The reason was to discourage adulterous connections.

In *Edwards v. Gaulding*, 38 Miss. 165, our court announces the rule of strict construction, which runs through all our reports, of all statutes making innovations on the common law, <sup>215</sup> and applies that rule of construction to a statute conferring rights on illegitimates. That statute was that, "hereafter all illegitimate children shall inherit the property of their mothers, and from each other," etc., and the court held that even the legitimate children of a bastard dying before the act could not inherit from an illegitimate uncle or aunt dying after its passage. Previously to this decision our court had been equally as explicit in *Porter v. Porter*, 7 How. (Miss.) 110, 111, 40 Am. Dec. 55. It holds that bastards are not comprehended under the word, "children," in our statute of descents; that those born out of wedlock are not numbered among children; that the word "children," in a will, where there were both legitimates and illegitimates, means legitimate children only; that illegitimates could not be the "stock through which consanguinity could be traced"; that they could not inherit from their mother, and that "it is the policy of the law to sustain the institution of marriage as the surest and safest groundwork on which society can rest, and to make that the only source from which inheritable blood can flow."

Discussion might well end here, on the decisions of our own state. But the doctrine is settled in the same way in nearly all the states, if not all, which treat of it. In Vermont a statute gave a right of action to anyone "in any manner dependent on" a person injured or dying by intoxicating liquors, against the seller of the intoxicant. In *Good v. Towns*, 56 Vt. 410, 48 Am. Rep. 799, a man named Good died from intoxicating liquor, and Mary M. Good sued the seller, averring that she had lived with Mr. Good as his wife, but not in lawful wedlock, for many years, and had borne him eight children, and that he had acknowledged them as his, and her as his wife, in the community, though he was in fact married to another woman, who lived in Massachusetts, and who had, long before, been through the ceremony of marriage with another man. Mary M. Good was joined in her suit by an illegitimate minor daugh-

ter of her unlawful connection with Mr. Good, also dependent on him for <sup>216</sup> support. The court denied relief on the ground that the legislature, by the word "dependent," meant "legally dependent," which could not refer to an adulteress or an illegitimate, without express mention, and that the act, being an innovation on the common law, must be strictly construed, and so as not to violate the public policy of discouragement of illicit intercourse. This is an extreme case, but the ruling was manifestly right.

In *McDonald v. Pittsburgh etc. Ry. Co.*, 144 Ind. 459, 55 Am. St. Rep. 185, 43 N. E. 447, Judge Monks collates the authorities on this subject, and they practically speak with one voice. Last year the whole doctrine was commented on in *Citizens' Street Ry. Co. v. Cooper*, 22 Ind. App. 462, 72 Am. St. Rep. 319, 53 N. E. 1092 et seq., with full approval. See, also, *Blair v. Adams*, 59 Fed. 243; 5 Am. & Eng. Ency. of Law, new ed., 1095; *Williams v. Kimball*, 35 Fla. 49, 48 Am. St. Rep. 238, 16 South. 783, and also the authorities cited in the briefs of counsel on both sides in the case at bar and in the briefs and opinion in *Illinois etc. R. R. Co. v. Johnson*, 77 Miss. 727, 28 South. 753.

If anything can be said to be settled on reason and authority, it is that statutory rights of action given kindred for injuries done another do not embrace illegitimate kindred, without express mention. Legislation must be presumed to be enacted in the light of the common law, and not to give or enlarge rights denied at common law to a class separated by it from the common mass, without express mention.

Counsel cite *Marshall v. Wabash R. R. Co.*, 120 Mo. 275, 25 S. W. 179, where the right of the mother of a bastard to sue for his death was sustained. It will be seen on page 282 of 120 Mo., 25 S. W. 181, that the opinion, in fact, rests on two statutes of the state of Missouri, the first declaring the mother to be the natural guardian of her illegitimate child. We have no such statute in Mississippi. The second declares that the mother may inherit from her bastard child. We have no such statute in Mississippi. Here the mother of a bastard cannot inherit from him.

<sup>217</sup> Now, if we turn to the statute under which appellee sued (Laws 1898, p. 83), we see that it refers to the "widow, husband, father, mother, sister, brother" of deceased, and we hold that it refers only to the legal widow, husband, father, mother, sister, brother, because illegimates are not expressly included.

People unmarried can leave no widow or husband, and illegitimates can leave no father, mother, sister, or brother, because they could have none at common law, and no statute enables them to have either. The collocation shows that legitimates only could have been referred to. Certainly, the putative father was not meant, and the adulterer or adulteress could not be meant under the terms "husband or widow," and we can imagine no process of reasoning by which the courts can interpolate the words "whether legitimate or illegitimate" before the words "father, mother, sister, or brother." Courts can only pronounce what the law is, not what they may think it ought to be.

The plaintiff below had no right to sue. If the right exists in anyone, it cannot possibly exist in anyone but the executor or administrator of the deceased.

Reversed and remanded.

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**Illegitimates.**—The word "child" or "children," when used in a statute, means legitimate child or children: *McDonald v. Pittsburgh etc. Ry. Co.*, 144 Ind. 459, 55 Am. St. Rep. 185, 43 N. E. 447.

**Death of Illegitimate.**—A father cannot recover for the death of an illegitimate son: *McDonald v. Pittsburgh etc. Ry. Co.*, 144 Ind. 459, 55 Am. St. Rep. 185, 43 N. E. 447. See, too, *Good v. Towns*, 56 Vt. 410, 48 Am. Rep. 799.

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## JONES v. SOMERVILLE.

[78 Miss. 269, 28 South. 940.]

**HUSBAND AND WIFE—CONVEYANCE TO PREVENT INHERITANCE BY.—FRAUD** on marital rights cannot be predicated of a voluntary conveyance by either husband or wife, made to prevent the other from inheriting.

A. A. Armistead, for the appellant.

Rush & Gardiner, for the appellee.

272 CALHOON, J. Mrs. Jones seeks cancellation of a voluntary conveyance made by her husband, S. B. Jones, a few months before his death, to the appellee, Mrs. Somerville, a daughter of a former marriage, by which he gave her real estate in value equal to about two-thirds of his entire fortune. This conveyance, the bill charges, was executed secretly, without the wife's knowledge, and held by the grantee, Mrs. Som-



erville, until a day or two after Mr. Jones died, when she filed it for record on the day of her father's funeral. This conveyance reserves to Mr. Jones, the grantor, the "possession, income, and profits" of the land until his death; he to pay the taxes and keep the plantation in repair. On the same day of the execution of this instrument, as the bill charges, Mr. Jones made his will, in which he refers to the conveyance, provides that it shall not be regarded as an advancement to Mrs. Somerville, and then gives all his remaining property, one-third to her, one-third to a daughter of his marriage to complainant, and one-third to complainant, his widow, the one-third to complainant, however, to determine at her death or marriage. Mrs. Jones renounces under the will. She charges that the conveyance was designed to be, and was, a fraud on her rights as wife. The bill was demurred to, the demurrer sustained, and Mrs. Jones appeals. Her contention is presented with signal ability, and has had our very careful consideration.

The question, sharply defined, is whether or not fraud on marital rights can be predicated of a voluntary conveyance by either husband or wife, made with the purpose to prevent the other from inheriting. It is clear that fraud on a child could not be predicated of such an act, though done with design to prevent its inheriting. Is the wife in any better situation? In this state marital community property is unknown, dower and curtesy tenancies no longer exist, and absolute, independent, and separate dominion over, and power of disposition of, property now pertain to each of the parties to the marriage. The <sup>273</sup> only feature in reference to the property of the husband or the wife in distinction from the property of any other person is that each inherits from the other a child's part of everything owned at death, and where there are no children or descendants of them, each inherits all, and where a will is made not satisfactory, the survivor may renounce under it and take the distributive share as upon intestacy: Code, sec. 4496.

In 1848 the law as to realty gave the wife dower in what he died seised and possessed of, or had before conveyed without her relinquishment of dower. As to personalty, in case of the death of the husband intestate, it gave the widow a child's part, or, if no children, one-half: Hutchinson's Code, 621. While that law prevailed, one Cameron executed a voluntary trust deed of his personal property to a trustee, to convey to two of his children at his death, but reserved in himself during his life the use, possession, and control of the property, its proceeds and natural increase, and if the children died before he did, the

title to revest in him. On these facts, and on the attack of the wife, this court held the right to be in the husband to so dispose of his personalty, "and to thus cut off his widow from dower in such property," and that the widow had no such interest in the personalty as the husband could not destroy by such a deed, and that such a deed could not be regarded as a will, and could not be considered a fraud on her, notwithstanding the reservation of control in him during his life: *Cameron v. Cameron*, 10 Smedes & M. 394, 48 Am. Dec. 759.

This case is conclusive of the case at bar. Its authority is in no way shaken by *Jiggitts v. Jiggitts*, 40 Miss. 718. The two cases perfectly consist. In the *Jiggitts* case, which concerned land, the then existing law gave the widow dower in lands, etc., "of which her husband died seised and possessed, or which he had before conveyed otherwise than in good faith and for a valuable consideration, and whereof said widow had not relinquished her right of dower," so that actual statutory property rights of the widow were under consideration, of <sup>274</sup> which fraud might, of course, be predicated, and the court held there was fraud, because of lack of valuable consideration, as prescribed by the statute. In that case, also, the deed was never delivered to the grantee, though, if it had been delivered, the result would have been the same.

Under the law now there is no marital interest, actual or inchoate, until the death of the spouse, in the ownership of the property, whether real or personal.

Affirmed.

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**Conveyances by a Husband During Coverture** to defeat his wife's marital rights are fraudulent and void as against her: *Walker v. Walker*, 66 N. H. 390, 49 Am. St. Rep. 616, 31 Atl. 14. See, too, *Ward v. Ward*, 63 Ohio St. 125, 81 Am. St. Rep. 621, 57 N. E. 1095. His bona fide transfers, however, are good: *Smith v. Smith*, 24 Colo. 527, 65 Am. St. Rep. 251, 52 Pac. 790; *Smith v. Smith*, 22 Colo. 480, 55 Am. St. Rep. 142, 46 Pac. 128. In the absence of actual fraud, and as against any postmortem claim of his widow, he may give to his children the bulk of his property: *Small v. Small*, 56 Kan. 1, 54 Am. St. Rep. 581, 42 Pac. 323.

## ILLINOIS CENTRAL RAILROAD CO. v. McLEOD.

[78 Miss. 334, 29 South. 76.]

**NEGLIGENCE OF DRIVER WHEN ATTRIBUTED TO PASSENGER.**—The hirer of a team and driver is himself guilty of contributory negligence, if he fails to check or remonstrate with the driver, when the latter attempts to cross the railroad track in open view, without stopping or listening for approaching trains.

**NEGLIGENCE, CONTRIBUTORY.**—The negligence of a railroad company in failing to give a signal of warning at a crossing does not avail a person to recover when he is injured through want of ordinary care in attempting to cross the railroad track.

Mayes & Harris and J. M. Dickinson, for the appellant.

M. McClurg and Breuer & Wilson, for the appellee.

**340** CALHOON, J. Mr. McLeod hired an open carriage, two horses, and a driver to transport him from Winona to Stafford's Well and back. The driver was a good, safe driver, and had been in service as such for a number of years. The horses were gentle in single harness, but he had never before driven them double. They were fast roadsters for a livery-stable team. It took about forty minutes to drive to the well, and the same time to return to Winona, and they remained at the well only about fifteen minutes. On returning they went west to the railroad, and at a point seventy-eight feet from the railroad's eastern iron rail to the center of the public road upon which they were traveling, in broad daylight, in an open vehicle, they had to, and did, drive through a lane made by a wire fence between them and the railroad right of way, which wire fence was on the right of way, fifty feet from the center of the railroad track on their west, and a plantation fence on their east, for a distance of three hundred **341** and sixty-five yards, in which drive they were never more than seventy-eight feet from the railroad track, and when they came to the point where their road turned to cross the railroad track they were but sixty-five feet from it. In order to cross the railroad track from this lane they had to make a turn from the lane of some abruptness around the corner of the wire fence which ran along the railroad right of way, and which corner was fifty feet from the center of the railroad track. Up to the place of the turn they were driving north, in the face of a stiff breeze coming from that direction. At the same time there was a freight train going north, unknown to them. The engineer saw them



as they were driving near the turn, but sounded no alarm for that crossing, for the reason, as he says, that he feared it might frighten their horses. Be this as it may, the occupants of the open vehicle, when they got to the turn, looked back, and saw no train, but, without stopping and listening, drove around the curve of the right of way wire fence and up to near the track, when they found the engine of the north-bound freight train right at them, when the engineer blew two sharp whistles. They had stopped suddenly, but too late, and the horses wheeled, threw Mr. McLeod out on the ground, causing injuries of which he soon after died. This puts the case absolutely as strong for the plaintiffs below as it can be put, and the evidence of the whisky drunk by the deceased and the driver on that drive, and of their conversation in the lane about the quality of the land in the field as they passed, is left out of view altogether.

Mr. McLeod gave the driver no directions at all, and in no way interfered with his management of the team. From the facts so put, it is too plain for controversy that, if the driver had been the party killed, no court would have permitted recovery. Recognizing this palpably clear proposition, the effort of appellees is to put Mr. McLeod in a different category, on the theory that the driver's negligence cannot be imputed to him, since he was merely the hirer of the driver, the vehicle, <sup>342</sup> and the team. But this doctrine cannot be stretched to save a case like this. It is a mistake to suppose that a passenger in an open buggy need not exercise the commonest prudence, the most ordinary care, when the danger of his surroundings is apparent. Ordinary and natural prudence requires him to take some action, and to check or remonstrate with the driver: *Dean v. Pennsylvania Co.*, 129 Pa. St. 514, 15 Am. St. Rep. 733, 18 Atl. 718; *Smith v. Maine Cent. R. R. Co.*, 87 Me. 350, 32 Atl. 967; and the other authorities cited in the brief of counsel for appellant. In *Alabama etc. R. R. Co. v. Davis*, 69 Miss. 444, 13 South. 693, this principle is recognized, and the appellee there saved her case by the proof that she tried to stop the driver. One crossing a railroad, who can see, must see at his peril: *Murdock v. Illinois etc. R. R. Co.*, 77 Miss. 487, 29 South. 25; *Jobe v. Memphis etc. R. R. Co.*, 71 Miss. 734, 15 South. 129; *Winterton v. Illinois etc. R. R. Co.*, 73 Miss. 831, 20 South. 157. In such cases the negligence of the railroad company in not sounding an alarm for the crossing cannot avail to condone the lack of ordinary care by the party injured. On plain principles, the verdict below

was unwarranted, and the motion for new trial should have been sustained. Notwithstanding our deep sympathy with the sufferers from the calamity, the case must be reversed and remanded.

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**The Negligence of a Driver is not Imputable to one riding by invitation:** *Leavenworth v. Hatch*, 57 Kan. 57, 57 Am. St. Rep. 309, 45 Pac. 65; *Reading Township v. Telfer*, 57 Kan. 798, 57 Am. St. Rep. 355, 48 Pac. 134. But it must appear that the passenger is himself free from blame or negligence: *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514, 15 Am. St. Rep. 733, 18 Atl. 718; *Noyes v. Boscawen*, 64 N. H. 361, 10 Am. St. Rep. 410, 10 Atl. 690. It has been held that the law does not impute to one the negligence of another unless the relation of master and servant exists between them: *Palmer v. St. Albans*, 60 Vt. 427, 6 Am. St. Rep. 125, 13 Atl. 569.

**Contributory Negligence in Crossing a Railroad will bar a recovery for injuries sustained:** *Tennessee Coal etc. R. R. Co. v. Hansford*, 125 Ala. 349, 82 Am. St. Rep. 241, 28 South. 45.

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## HASIE v. ALABAMA AND VICKSBURG RAILWAY CO.

[78 Miss. 413, 28 South. 941.]

**NEGLIGENCE, CONTRIBUTORY—VIOLATION OF LAW.** Contributory negligence cannot be based on knowledge by a person injured that the person inflicting the injury habitually violates the law, and should be expected to continue to violate it.

**NEGLIGENCE, CONTRIBUTORY—KNOWLEDGE OF VIOLATION OF LAW BY RAILROAD COMPANY.**—Knowledge by a person that a railway company habitually runs its trains at an excessive rate of speed, in violation of law, does not render him guilty of contributory negligence, merely because he does not act upon the assumption that the train by which he is injured would be so run.

Green & Green, for the appellant.

McWillie & Thompson, for the appellee.

**415** **BOOTHE, S. J.** Appellant brought suit against appellee in the court below to recover damages sustained by a personal injury inflicted by <sup>416</sup> the railway company while the appellant was attempting to cross the bridge and trestle of the company across Pearl river, in the city of Jackson, November 21, 1898. The declaration alleges that he was the servant and employé of the Groton Bridge and Manufacturing Company, which, at the time of the injury complained of, was con-

structing piers for a new bridge for defendant in close proximity to the bridge then in use, and that the servants of the Groton company used the railroad bridge as a way to and from their work of construction, and as occasion required, with the knowledge and consent of the resident engineer of the railway company, who was superintending the work in progress; that appellant, the engineer and servant of the Groton company, was going over said bridge and trestle to perform some duty in respect to said piers when he was struck by the locomotive and train of appellee, running at an excessive rate of speed, knocked off the trestle, and permanently injured. To this declaration appellee pleaded the general issue and contributory negligence. To the plea of contributory negligence there was a demurrer, which was overruled, after which issue was taken on same. This demurrer was properly overruled.

It appears from the evidence that the train by which appellant was injured was on its way from west to east across Pearl river; that the wind was briskly blowing in the opposite direction; that there was a sharp curve in the railroad track near the bridge; that the plaintiff looked back before going on the bridge, but saw and heard no train; that, after going about fifty steps on the trestle leading to the bridge, appellant looked back and saw the train approaching, and at once made an effort to escape from his perilous position, but was knocked off or fell off, and that, in rounding the curve, no whistle was blown and no bell rung to give warning of danger, the air brake in emergency was not applied, no sand was used and the engine was not reversed. It is also in proof that the servants of the railway company endeavored to stop the train to avert injury <sup>417</sup> and did all in their power. As to this and the speed of the train there was some conflict.

It is apparent from an examination of the whole record that the questions raised by the pleadings were properly submitted to the jury, and it follows logically that, if there is no error on the part of the learned trial judge, the verdict and judgment ought to be affirmed. We cannot sustain the first, second, third, fourth, and sixth assignments of error.

The fifth assignment of error is that the court erred in granting appellee's first, second, third, and fourth instructions. As to this assignment of error we hold that the second charge was erroneous, but the error is cured by the fourth instruction given for appellant. The first and fourth instructions are erroneous in this: That the question of contributory negligence in both instructions is predicated upon an untenable hypothesis. In



both instructions the plaintiff below, and appellant here, is called upon to assume that, if he knew, or had opportunity to know, that defendant's trains were accustomed to run over the bridge at an excessive rate of speed, they would continue to be so run; and in view of such knowledge, or opportunity of obtaining same, he is, by the terms of these instructions, chargeable with contributory negligence in going on the bridge "without first informing himself that the train had passed over," is the language of the first instruction; and that he did not "put out, or cause to be put out, flags or other warnings to notify the train crew that he was on the bridge," is the language of the other. It is not sound doctrine to base a question of so much importance as that of contributory negligence in this case upon the untenable foundation set out in these charges, and call upon the plaintiff to assume that, because the railroad company had been accustomed to violate the law, it would do so the morning of the alleged injury. He had a right to assume, from all the surroundings, that the train would be running at the legal rate of speed. While the jury without these charges might have reached the same conclusion, <sup>418</sup> the charges named were well calculated to mislead them. Because of the errors mentioned, the verdict of the jury is set aside, the judgment of the court below is reversed, and the cause remanded.

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**Railroads—Unlawful Speed.**—Recovery may be had for the death of a person by being run over by a train run at a greater rate of speed than is permitted by a city ordinance, unless he was guilty of contributory negligence. In such case the violation of the ordinance is negligence per se: *Jackson v. Kansas City etc. R. R. Co.*, 157 Mo. 621, 80 Am. St. Rep. 650, 58 S. W. 32. It is held that, though a trespasser on a railway track is injured by a train running at a rate forbidden by ordinance, he must, to entitle him to recover, prove that his injury was caused by the rate of speed, without contributory negligence on his part: *Reidel v. Philadelphia etc. R. R. Co.*, 87 Md. 153, 67 Am. St. Rep. 328, 39 Atl. 507.

**Railroads.**—Where a city ordinance limits the speed of railway trains, the law presumes that one crossing a track acts upon the assumption that an approaching train is not running at a speed in excess of the prohibited rate: *Hutchinson v. Missouri Pac. Ry. Co.*, 161 Mo. 246, post, p. 710, 61 S. W. 635, 852.

**NORTH AMERICAN TRUST COMPANY v. LANIER.**

[78 Miss. 418, 28 South. 804.]

**MORTGAGES—HOMESTEAD—FORGED SIGNATURE.**—If a husband executes a mortgage on his lands, including his homestead, and forges the signature of his wife thereto, without the knowledge of the mortgagee, the mortgage is valid as to any excess of land over and above the homestead.

**MORTGAGES—HOMESTEAD—FORGED SIGNATURE—PURCHASE MONEY LIEN.**—If a husband executes a mortgage on all of his lands, including his homestead, forging the name of his wife thereto without the knowledge of the mortgagee, partly to secure the purchase money debt, satisfied by the mortgagee, and partly for borrowed money, the mortgage binds all of the lands in so far as it secures the purchase money debt, and binds the land in excess of the homestead for the money otherwise borrowed.

**MORTGAGES—HOMESTEAD—SUBROGATION.**—If a husband executes a mortgage on all of his land, including his homestead, partly to obtain money to pay a purchase money debt, the mortgagee by taking up and holding the note for such purchase money debt is entitled to be subrogated to all of the rights of the original holder thereof, as against all of the land, including the homestead.

**VENDOR AND VENDEE—VOLUNTEERS—TAX TITLES.**—A grantee in a voluntary conveyance takes subject to all existing equities against his grantor, and cannot subsequently acquire the land at tax sale freed from such equities.

**VENDOR AND VENDEE—VOLUNTEERS—TITLE ACQUIRED AT TAX SALE.**—A party in possession as a mere volunteer by gift cannot defeat a vendor's lien, or a right of a mortgagee to an excess over the homestead in the land, by buying it at a tax sale, or from one who has bought it at such sale.

**NOTICE—FRAUD—STATUTE OF LIMITATIONS.**—Mere filing a bill in equity to cancel a deed for fraud, without any service of summons on the defendant, does not impart notice to him of the concealed fraud charged in the bill. And thereby put the statute of limitations in operation against him.

**SUBROGATION AS AGAINST VOLUNTEERS.**—The right of subrogation passes to innocent assignees in virtue of equity and not of contract, and is of avail to them against all volunteers or mere donees.

Dabney & McCabe, for the appellant.

T. McKnight, for the appellee.

426 **CALHOON, J.** On March 22, 1887, Frank B. Lanier was the owner in fee simple of the lands in controversy, and on that date he borrowed five hundred dollars from L. N. Buck, to secure which, payable in five years, he presented a trust deed purporting to be signed and to be duly acknowledged by himself and his wife, Mary E. Lanier, before a justice of the peace, who

has since died. The record appearing free from any encumbrances or liens, Mr. Buck furnished the five hundred dollars. Mrs. Lanier, the appellee, testifies that she knew nothing of this loan; that her name to the deed is a forgery, which she "reckons" was committed by her husband, Frank B. Lanier, who was not produced as a witness by either side. And she further testifies that the certificate of the justice of the peace that she acknowledged the instrument is false. The court below found in her favor on the facts, and we will not disturb the conclusion to which it arrived as to this. Mr. Buck, however, <sup>427</sup> was without any knowledge or suspicion of this fraud. Notwithstanding the fraud, inasmuch as the husband was the owner of the lands, the conveyance in trust was valid as to any excess over the homestead, and, of course, there passed to his assignees, immediate or remote, the same right he had to resort to such excess for satisfaction. A few weeks after this transaction, Mr. Buck discovered that there was a sum of about five hundred dollars unpaid by Mr. Lanier of the purchase money of the lands, which sum was a lien on them, and that a cancellation appearing on the record of this lien was false and fraudulent, and that this debt for unpaid purchase money was held by Mr. Ben Dart as guardian of some minors, and so, for his own protection, Mr. Buck bought this debt, and had the note for it assigned to him. Thereupon he undertook to have it consolidated with the first note, and, pursuant to arrangement with Mr. Lanier, he was to mark "satisfied" on record of his trust deed, upon being furnished another to secure one thousand dollars, this amount being made up of the original five hundred dollars debt to him and the five hundred dollars of the unpaid purchase money note he had bought. So Mr. Lanier brought or sent him another trust deed, with the same trustee for security, for the one thousand dollars, with ten per cent interest, payable five years after date, purporting to be signed by him and his wife, and purporting to be acknowledged by her and him before the same justice of the peace. This trust conveyance bears date May 21, 1887. Mrs. Lanier swears that she never signed or acknowledged this instrument, and the court below held accordingly, and we do not disturb this ruling. Mr. Buck believed the whole thing valid, and there was no circumstance to awaken his suspicions. In this attitude of the case it is very clear that his trust deed was valid to the extent of the unpaid purchase money paid by him on all of the land, and on the excess over the homestead for the remainder of his debt. As to the unpaid purchase money, the note for which he was



the assignee covered the whole land, and he canceled this security under the belief that his new trust deed securing <sup>428</sup> his new \$1,000 debt covered the whole land, which it would have done if Mr. Lanier had not forged his wife's signature. The vendor's lien note is filed by complainant in evidence.

Afterward, and on December 31, 1887, Mr. Lanier conveyed the whole land to his wife, Mary E. Lanier. She was a volunteer, pure and simple, and paid nothing for it, and so she took it charged with all the equities of Mr. Buck. Subsequently to this donation by him to his wife, Mr. Lanier wanted more money; and so he negotiated a loan of \$2,100 from the Jarvis-Conklin Loan Company, and, in order to get it, presented a trust deed purporting to be signed and acknowledged by him and his wife. Mrs. Lanier swears that this is another forgery, and the court sustained her, and we do not disturb the decree as to this. This instrument is of date January 1, 1890, to secure the note of the grantors, Lanier, and wife, payable five years after date, interest payable semi-annually, as shown by coupons, at six per cent per annum, but the coupons to bear ten per cent after maturity, and the debt to become due in full, at the option of the beneficiary, on any default, and Lanier and wife were to keep the taxes paid; and this covenant as to taxes is in both the Buck trust deeds, before mentioned. Out of this \$2,100 the Buck debt was wholly paid, and he marked it "satisfied" on the record of the trust deed which had been given to secure him his \$1,000. This payment to Buck was required to clear the record title, and complainant holds the notes by Buck's assignment to a bank, and the bank's indorsement in blank. Default being made in interest payments on the \$2,100, the land was sold by a substituted trustee, and conveyed to Murray F. Smith, Esq., who was agent for the Jarvis-Conklin Company, and his bid was credited on the \$2,100 note. This conveyance was of date October 3, 1891. On October 19, 1891, Smith conveyed the land to Beardsley and Gilbert, who on December 12, 1894, conveyed it to the Western Investment Company, which on March 1, 1897, conveyed it to appellant, who, on June 17, <sup>429</sup> 1898, filed the original bill in this cause, praying the court to cancel certain tax conveyances, to be hereinafter referred to, as clouds, and praying to be put in possession of the lands. To this bill Frank B. Lanier made no appearance, and a decree pro confesso was taken against him. But she did answer, and set up that her numerous signatures to deeds and notes were frauds and forgeries, sets up homestead rights, relies on the gift conveyance by her husband to her of

May 21, 1887, and relies on the tax titles. There was an amended bill, an answer and cross-bill, a demurrer to the cross-bill overruled, and then an answer to that, all of which we need notice no further than to say that the facts hereinbefore detailed and to be stated appear in appropriate pleadings.

The tax titles set up by Mrs. Lanier are traced through three tax conveyances to one P. H. Feld, each of the same date (March 2, 1891), purporting to convey each separate parcel of what Mrs. Lanier avers to be the land in controversy, and next a conveyance from Feld to Gibson of date May 25, 1892, and finally a conveyance from Gibson of date November 11, 1893, to her and "her children then living," and the children are parties to this cause. She relies on this and the three years statute of limitations in favor of purchasers at tax sales. Now, it is plainly manifest that Mr. Buck, and all the parties in interest under him, at the time they became interested, were in absolute ignorance of all the frauds of F. B. Lanier which have been recited. Every action was had in the utmost good faith, under the belief, derived from the face of the records, that the instruments were duly signed and acknowledged by Mrs. Lanier. Now, if they had been genuine, it is too plain to discuss that Mr. Buck could not have been defeated as to the \$500 vendor's lien paid on the whole land, and as to the \$500 afterward loaned by him when Mr. Lanier was sole owner, by the tax title or anything else set up by Mrs. Lanier and her children that appears in this record, short of the statute of limitations from the time of notice of the fraud. They were in possession, <sup>430</sup> and remained so, charged with all the equities of Mr. Buck; and it was their duty to keep the taxes paid, and any purchase by them or for them of an outstanding tax title was a mere extinguishment of it for the benefit of Buck's equities, and for the benefit of all parties under and in privity with him. It is not to be tolerated that a party in possession as a mere volunteer by gift may defeat a vendor's lien, or a right of one to the excess over the homestead, by buying at tax sale, or from one who has bought at tax sale. A tenant in common, even out of possession, could not do this: *Cohea v. Hemingway*, 71 Miss. 22, 42 Am. St. Rep. 449, 14 South. 734. And much less can it be done by volunteers in possession solely under the fraudulent husband and father. This disposes of the tax title, and so we do not address ourselves to any inquiry as to whether the tax conveyances are or are not void on their face.

But Mrs. Lanier goes even further in the effort to continue to enjoy the fruits of the monstrous frauds committed by her husband. Believing that the statute of limitation might save to her the plunder achieved by her husband's unparalleled iniquity, she sets up the bar of the statute of limitations, and, aware that she could not show actual notice of the fraud, she endeavors to show constructive notice to start the running of the statute. In cases of fraud the cause of action "first accrues at, and not before, the time at which the fraud shall or, with reasonable diligence, might have been first known or discovered": Code, secs. 2731-2762. Plainly in the case at bar the statute of three years cuts no figure, as the debts were all evidenced by notes. The constructive notice on which Mrs. Lanier relies consists of a bill in equity (No. 2282 on the docket) filed in her name on June 3, 1892, against Beardsley & Gilbert, attacking the conveyance to Murray F. Smith, and his conveyance to Beardsley & Gilbert, as well as that from the substituted trustee under the first deed to secure the Jarvis-Conklin Mortgage Company, on the ground that her husband or some one else had signed her name to the trust <sup>431</sup> deed, and that her husband had got the money, and used it for "his own private ends and enjoyment." About this bill, however, strangely enough, she swears as a witness in the case now at bar that she knew nothing, and that she never authorized it to be filed. Be this as it may, and if she can set up the six years statute of limitations—which we do not decide—the facts do not sustain her in the contention that that bill was notice within that period. It could not be notice to Beardsley & Gilbert until service of notice on them, or publication of notice to them as non-residents, or actual notice of the pendency of the proceeding, of all which there is not pretense of proof.

It is true it is shown that Murray F. Smith, Esq., out of whom the title had passed before the filing of bill No. 2282, which is apparently still pending, without any proceedings subsequent to the mere issuance of process, had notice of the bill and had agreed to answer it, but on account of pressure of business overlooked it; but it is nowhere shown that he had such notice within fourteen days after the process issued on it, which was June 3, 1892, and unless it was within that time, six years had not elapsed. But if the notice to him had been in time, it would not avail. He was not employed by Beardsley & Gilbert in that case. He was their counsel in Vicksburg to examine records and pass on titles, but it nowhere appears that he was ever authorized to accept service of process for them in any



case. The doctrine of caveat emptor, of course, has no sort of application here. The chain of title shows purchasers innocent of any notice of the monstrous frauds, all in privity with Buck and clothed with all his equities, and parties in possession by gift must respond to them. They cannot avoid them and continue to enjoy a donation from the author of the fraud, or set up a tax title acquired by them while in possession. They took Frank B. Lanier's title charged with all the duties he was charged with, and amenable to the compulsion of the same equities which he would be compelled to satisfy. They are not in the category of innocent purchasers, whom the courts will <sup>432</sup> not be permitted to be damaged under the doctrine of subrogation: *Bonner v. Lessley*, 61 Miss. 393. The right of subrogation passes to innocent assignees in virtue of equity, and not of contract, and is of avail to them against all volunteers or mere donees. Neither Buck nor any subsequent holder of the paper would have touched it but for ignorance of the fraud. The case is reversed and remanded, with directions to the court below to ascertain the amount, principal and interest, as the note runs of the debt for unpaid purchase money extinguished by Buck, and make the sum total a charge, with interest from date of payment by Jarvis-Conklin Mortgage Company, on all the land, and to ascertain likewise the sum total of principal and contract interest on the remainder of the \$1,000 Buck note, and make it a charge, with interest from date of payment by Jarvis-Conklin Mortgage Company, on the land in excess of the homestead, the homestead to be allotted according to law. Otherwise, the final decree below is not disturbed.

Affirmed in part and reversed in part.

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**A Mortgage of a Homestead for unpaid purchase money, executed by the fee owner, need not be signed by the husband or wife of such owner; and if the mortgage is given in part to secure indebtedness other than the purchase money, it is valid to the extent of the purchase money, though void as to the residue:** *Roby v. Bismarck Nat. Bank*, 4 N. Dak. 156, 50 Am. St. Rep. 633, 59 N. W. 719. See, further, the note to *Alt v. Banholzer*, 12 Am. St. Rep. 683-686; *Council Bluffs Sav. Bank v. Smith*, 59 Neb. 90, 80 Am. St. Rep. 669, 80 N. W. 270.

**The Right of Subrogation is independent of any contractual relations; it is a creation of equity existing solely for accomplishing the ends of substantial justice:** See the monographic note to *Mobile Ins. Co. v. Columbia etc. R. R. Co.*, 44 Am. St. Rep. 731. It is an equitable, and not a legal, right: *Makeel v. Hotchkiss*, 190 Ill. 311, 83 Am. St. Rep. 131, 60 N. E. 524.

## BROWN v. STATE.

[78 Miss. 637, 29 South. 519.]

**CRIMINAL LAW—EVIDENCE.**—Statements made to an accused by the person fatally wounded, charging the former with having wounded him, if at once denied by the accused, are inadmissible in evidence when not made as dying declarations nor constituting any part of the *res gestae*. Such denials are also inadmissible.

W. H. Maybin, for the appellant.

M. McClurg, attorney general, for the appellee.

**638** TERRAL, J. Jonah Brown, with two others, was indicted in the circuit court of Harrison county for the murder of Syd Harden, and, being separately tried for said offense, was convicted of manslaughter. Upon his trial, threats made by him against the life of Harden were given in evidence. In addition to the threats, Susan Camp testified that she lived in the immediate neighborhood of the homicide, and that she heard three shots fired, and that they (meaning, of course, more than one) passed in front of her gate, when she heard the defendant say, "Did you see that nigger jump when I shot him?"

Judge Seal and Officer Duckworth were severally put upon **639** the stand, and each testified before the court and jury that having arrested the defendant, they carried him to the house where Harden was lying wounded, and asked him if he knew Brown, when Harden accused Brown of shooting him and of shooting him for nothing, and that Brown denied the accusation.

Brown was shot in the evening, about dusk, or between 7 and 8 o'clock, and Officer Duckworth and Justice of the Peace Seal, according to the evidence of Duckworth, had this interview with Harden in the presence of Brown, about half an hour or three-quarters of an hour after the shooting of Harden. After midnight Dr. Leger visited Harden, and he died some two or three hours thereafter. The evidence of Judge Seal and of Officer Duckworth was evidently made much of by the prosecution, and it contributed very materially, perhaps, to the conviction of the defendant. It is difficult for us to see upon what ground this evidence was admitted. It is no part of the *res gestae*, because the tragedy was entirely over and this house of mirth was fast becoming the house of death. It was a past transaction, and every relation of it was of the past event.

It is not a part of the *res gestae*, nor was it admissible as a dying declaration, because there was no evidence that Harden had a consciousness of impending death. It is not pretended to be a dying declaration. Indeed, the gross irreverence and blasphemy of the words used by Harden against Brown, and denied by Brown, were such that it is impossible to suppose that Harden had any conscious sense of the presence of the great I Am, and, without such consciousness, it was wanting in all the elements that sanction its admissibility and weight as evidence. If what Harden said to Brown is admissible at all in evidence, it is admissible as tending to show a confession. But how it is admissible as so tending we are at as great a loss to see as we are to see how it was admissible as a part of the *res gestae* or as a dying declaration.

"If A, when in B's presence and hearing, makes statements which B listens to in silence, interposing no objections, A's <sup>640</sup> statements may be put in evidence against B whenever B's silence is of such a nature as to lead to the inference of assent": Wharton on Criminal Evidence, sec. 678; *Kendrick v. State*, 55 Miss. 436. But here there is no assent to the charge made by Harden. On the contrary, the defendant denied the charge as soon as made. It is impossible to torture what passed between Harden and Brown before Judge Seal and Officer Duckworth as an admission of guilt on the part of Brown. It should have been excluded.

The judgment of the circuit court is reversed, and the case is remanded for a new trial.

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**Res Gestae.**—Statements made several hours after an accident are not admissible as part of the *res gestae*: *Purcell v. Chicago etc. Ry. Co.*, 109 Iowa, 629, 77 Am. St. Rep. 557, 80 N. W. 682; *Globe Accident Ins. Co. v. Gerisch*, 163 Ill. 625, 54 Am. St. Rep. 486, 45 N. E. 563. Declarations of an accused made a few minutes after a homicide are admissible against him: *Griffin v. State*, 40 Tex. Cr. Rep. 312, 76 Am. St. Rep. 718, 50 S. W. 366. To make declarations part of the *res gestae*, they must be contemporaneous with the main fact, though not precisely concurrent in point of time. If they spring out of the transaction, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are to be regarded as contemporaneous: *State v. Arnold*, 47 S. C. 9, 58 Am. St. Rep. 867, 24 S. E. 926. See, further, *Hedge v. Williams*, 131 Cal. 455, 82 Am. St. Rep. 366, 63 Pac. 721, 64 Pac. 106; *Mason v. Southern Ry. Co.*, 58 S. C. 70, 79 Am. St. Rep. 826, 36 S. E. 440.

**Dying Declarations are Admissible** when they relate only to the identification of the prisoner, his perpetration of the homicide, and the circumstances immediately attending it, and are made when the decedent had no hope of recovery: *State v. Bowles*, 146 Mo. 6, 69 Am. St. Rep. 598, 47 S. W. 892



## CLUE v. STATE

[78 Miss. 661, 29 South. 516.]

**INDICTMENT—DUPLICITY.**—An indictment charging the burning of a cotton-house, the property of a certain person, and the burning of the cotton in the house, the joint property of such person and another, is not bad for duplicity.

**INDICTMENT—DUPLICITY.**—Charging two offenses in one count in an indictment is bad practice, but objection thereto cannot be raised except by demurrer.

J. F. Dean, for the appellant.

M. McClurg, attorney general, for the appellee.

**662** CALHOON, J. The indictment charges that defendant “unlawfully, willfully, feloniously, and maliciously did set fire to and burn a cotton-house worth one hundred dollars, the property then and there of R. B. Carter, and three bales of cotton contained therein, which cotton was then and there the joint property of R. B. Carter and Babe Lee, and worth one hundred and twenty dollars,” etc. Defendant did not demur, but **663** moved the court to require the state to “elect on which count” in the indictment it would proceed, which motion the court overruled.

While charging two offenses in the same count is bad practice, still, as it appears on the face of the indictment, the objection should have been made by demurrer: Code 1892, sec. 1354. But aside from this, the charge is of one act at the same time, and we think the indictment valid. The house could not be burned without the cotton or the cotton without the house. It really charges the burning of the house, and, as an incident, the cotton in it. Although differing from the case of *Avant v. State*, 71 Miss. 78, 13 South. 881, the reasoning of that case applies.

It is plain that defendant could not have received any detriment, and did not, by any action of the court below. He was defended there and here with marked ability, and while on the evidence we would not have convicted him, we cannot say that the verdict was manifestly wrong, and so we are compelled reluctantly to sustain the conviction.

Affirmed.

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**Indictment.**—Duplicity in a criminal pleading is the joinder of two or more distinct and separate offenses in one count: *State v.*

Warren, 77 Md. 121, 39 Am. St. Rep. 401, 26 Atl. 500. See, further, the monographic note to *Ben v. State*, 58 Am. Dec. 238-250, on charging two or more offenses in the same indictment. An indictment charging as a single act the burning of several houses is not bad for duplicity; *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464.

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## HOSKINS v. ILLINOIS CENTRAL RAILROAD CO.

[78 Miss. 768, 29 South. 518.]

**HOMESTEADS—TAXATION.**—Land entered under the homestead laws of the United States is not subject to taxation until the right to a patent is perfected.

**TAXATION—TAX SALES.**—A STATUTE OF LIMITATIONS barring suits for land against persons holding under tax titles applies only to land taxable when sold for taxes.

Ejectment. Defendant claimed the land under tax sales made in 1885, and showed three years' adverse possession under tax deeds. The land was homesteaded from the United States in 1882, and the homesteader had not secured his patent therefor when the tax sales were made. Judgment for defendant. Plaintiff appealed.

J. A. P. Campbell and C. Chrisman, for the appellant.

Mayes & Harris and J. M. Dickinson, for the appellee.

**771 TERRAL, J.** Land entered under the homestead laws of the United States may not be sold for taxes assessed before the time at which a right to a patent is perfected. A sale before such time is absolutely void, and cannot support, under section 2735 of the code of 1892, a claim of title by reason of three years' actual occupation thereunder. Section 2735 applies to sales of lands only that are taxable and salable, and in which there is some defect in the proceedings relating to the assessment or sale. In such case the owner, knowing his land to be taxable, ought to be on his guard against their loss by any negligence of his own. It applies to lands that are taxable and which should have been assessed, and which were assessed and sold, but the proceedings relating to the assessment or sale are infected with some infirmity of which the statute is to be the cure. It does not affect fundamental rights—as a liability to taxation, a question only of constitutional or legislative authority. Could it do so, the subordinate officers of government

could defeat the will of the sovereign power and accomplish by indirection what the laws plainly forbid.

The learned judge, in *Patterson v. Durfey*, 68 Miss. 784, 9 South. 354, places the reason for the statute upon the ground of the "neglect" of the taxpayer, but there is no neglect where there is no power in the authorities to assess the land for taxes. And this is true whether the land is exempt, because it belongs to the federal government or to the state, or to the county or to a <sup>772</sup> municipality, or to a levee board, or is for any reason exempted from taxation. We see no reason in the nature or qualities of the exemption, by reason of the ownership of the land by the federal government or other owner. We place our decision upon the ground that the property is exempt from taxation by law, and all attempts to subject it to taxation is in fraud or in violation of law, is the act of wrongdoers, and cannot give color for divesting the title of the owner by three years' actual occupation under section 2735 of the code of 1892.

The cases of *Patterson v. Durfey*, 68 Miss. 779, 9 South. 354, and *Carlisle v. Yoder*, 69 Miss. 384, 12 South. 255, so far as they are in conflict with this decision, are overruled.

Reversed and remanded.

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**Taxation.**—After a final homestead certificate to public land has been issued entitling the holder to a patent, the land is subject to taxation, although the patent has not yet issued: *Burcham v. Terry*, 55 Ark. 398, 29 Am. St. Rep. 42, 18 S. W. 458.

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## ILLINOIS CENTRAL RAILROAD CO. v. ARNOLA.

[78 Miss. 787, 29 South. 768.]

**LICENSEES—OWNER'S DUTY.**—A licensee who, without invitation or inducement of the owner, goes upon his land, takes such permission with all the dangers attending it. The owner owes him no duty except not to inflict upon him a willful or wanton wrong, and is not liable for the negligence of his servant toward such licensee.

Mayes & Harris, for the appellant.

J. S. Sexton and R. P. Willing, Jr., for the appellee.

<sup>787</sup> **TERRAL, J.** The appellee, in order to avoid making the angle of the street corner, crossed the lot of the appellant, and, by the negligence of its servant engaged in painting a water-tank thereon, was seriously injured. The path across the



lot of appellant was <sup>788</sup> used indiscriminately by the citizens of Crystal Springs, but without any inducement held out by the railroad company for them to do so. The appellee was not on business with the company, but was upon its lot of land in pursuit of her own pleasure and errand. She was a mere licensee, and the appellant owed her no duty except that of not inflicting upon her a willful or wanton wrong. The appellee was injured by the negligence of one of appellant's servants, and for that negligence the appellant is not liable. A person who, without the invitation or inducement of the owner, goes upon the land or premises of such owner, takes such permission with all the dangers attending it. A master is not responsible to a servant for the negligence of a fellow-servant; a fortiori, he is not responsible to a stranger for such negligence. The appellee, in going upon the private lands of the appellant, took upon herself all the risks of such entry. The damage suffered by her is not an injury for which an action lies: *Batchelor v. Fortescue*, L. R. 11 Q. B. Div. 474; *Hounsell v. Smyth*, 7 Com. B., N. S., 731; 97 Eng. Com. L. 742; *Redigan v. Boston etc. R. R. Co.*, 155 Mass. 44, 31 Am. St. Rep. 520, 28 N. E. 1133; *Collis v. Selden*, L. R. 3 C. P. 495; *Gautret v. Egerton*, L. R. 2 C. P. 371.

Reversed, and judgment entered here for appellant.

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**Licensee.**—That the owner of property ordinarily owes no duty to mere licensees and trespassers, see *Buch v. Armory Mfg. Co.*, 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809; *Arnold v. St. Louis*, 152 Mo. 173, 75 Am. St. Rep. 447, 53 S. W. 900; *Cooper v. Overton*, 102 Tenn. 211, 73 Am. St. Rep. 864, 52 S. W. 183; *Quigley v. Clough*, 173 Mass. 429, 73 Am. St. Rep. 303, 53 N. E. 884. This rule, however, does not exempt him from liability for his active negligence toward them: *Pomponio v. New York etc. R. R. Co.*, 66 Conn. 528, 50 Am. St. Rep. 124, 34 Atl. 491; *Palmer v. Gordon*, 173 Mass. 410, 73 Am. St. Rep. 302, 53 N. E. 909.

On the Liability of a Master for the acts of his servant, see the monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71-93.

**PULLMAN COMPANY v. ADAMS.**

[78 Miss. 814, 30 South. 757.]

**INTERSTATE COMMERCE—PRIVILEGE TAX.**—A statute imposing a privilege tax on all sleeping and palace car companies carrying passengers from one point to another within the state, and also a certain tax per mile "for each mile of railroad over which such company runs its cars," is not void as a regulation of, or license upon, interstate commerce.

**LICENSE TAX ON UNPROFITABLE BUSINESS.**—A privilege tax imposed upon sleeping and palace car companies for transporting passengers from one point to another within the state cannot be avoided by proving that such business is compulsory and done at a loss.

Action to collect a privilege tax, imposed upon certain car companies. Judgment for plaintiff. Defendant appealed.

McWillie & Thompson, for the appellant.

Harper & Potter, for the appellee.

**829 WHITFIELD, C. J.** The statute under construction is in these words: "Code 1892, sec. 3387. Sleeping-cars.—On each sleeping and palace car company carrying passengers from one point to another in this state, one hundred dollars. And, in addition thereto, twenty-five cents a mile for each mile of railroad over which the company runs its cars."

The whole purpose of this statute, from its terms, manifestly is to require a privilege tax to be paid for doing business within this state, and for that business alone. It relates exclusively to the local business done by the Pullman Company within this state. It does not require any tax to be paid for the privilege of doing the interstate business of the company. It does not in any manner affect its interstate business. "It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state."

The case of *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. Rep. 214, is decisive of this case. The case of *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851, is clearly discriminated from *Osborne's* case by Mr. Justice Peckham, who there says: "It has never been held, however, that when the business of the company which is wholly within the state is but a mere

incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to, and is not imposed upon, the business of the company <sup>830</sup> which is interstate, there is no interference with that commerce by the state statute."

It was stated by Mr. Justice Bradley, in the course of his opinion in the Crutcher case, that "taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection," viz., an objection that the tax or license was a regulation of, or that it improperly affected, interstate commerce. We have no doubt that this is a correct statement of the law in that regard. The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the state whatever, unless upon the payment of the fee or tax. It was said as to those cases that, as the law made the payment of the fee, or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state.

The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid. In *Postal Telegraph Cable Co. v. Adams*, 71 Miss. 565, 42 Am. St. Rep. 476, 14 South. 39, afterward affirmed by the United States supreme court (155 U. S. 688, 15 Sup. Ct. Rep. 268, 360), this court said: "Every tax is a burden, and, to the extent imposed, is an interference with the pursuit or business upon which it is laid. If the business is partly interstate commerce, then that commerce is incidentally affected and interfered with by every tax, of any nature whatever, that may be levied on it. In the case at bar there is no direct burden upon interstate commerce; there is no further interference with <sup>831</sup> it than will be found necessarily to result from the imposition of any burden or taxation in any shape."



The contention that the appellant does its local business at a loss, and yet must do it under the constitution of 1890 making it a common carrier, and hence that its interstate business is indirectly burdened, is fallacious. Were that so, it would be the provisions of law declaring the sleeping-car companies common carriers that would contravene the interstate commerce clause of the federal constitution, not this license tax statute.

It is not for the appellant to get all out of the local business the "traffic will bear" and then escape the correlative burden of this license tax by pleading that it, though conforming to the law making it a common carrier, as to profits, should not conform to the law taxing the business it does wholly local and entirely within this state. *Pickard v. Southern Pullman Car Co.*, 117 U. S. 34, 6 Sup. Ct. Rep. 635, is wholly unlike this case. There a tax was levied on each sleeping-car, whether in state or interstate business, and the tax was required to be paid if the local business had been entirely abandoned.

We think the action of the court below clearly right, and the judgment is affirmed.

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**Taxation.**—A state cannot interfere with interstate commerce by imposing a tax for the privilege of transacting such commerce, but it does have a right to tax all the instrumentalities within the state used for such commerce: *Hall v. American Refrigerator etc. Co.*, 24 Colo. 223, 65 Am. St. Rep. 223, 51 Pac. 421. See, further, the monographic note to *Buck v. Miller*, 62 Am. St. Rep. 474, 475; *Postal Tel. Cable Co. v. Adams*, 71 Miss. 555, 42 Am. St. Rep. 476, 14 South. 36.

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## **TATE v. YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY.**

[78 Miss. 842, 29 South. 392.]

**CARRIERS—BILL OF LADING—CONTRACT OF CARRIAGE.**—A bill of lading is not essential to charge the carrier with the duty of safely transporting the property delivered for carriage, but the doing of the several acts entitling the shipper to a bill of lading is necessary to charge the carrier with the safety of the articles intrusted to him.

**CARRIERS—DELIVERY OF GOODS.**—The mere loading of cotton by a shipper on a car set out at a siding, as is customary, where the carrier has no station or agent, and neither it or its agent has any knowledge that the car is loaded ready for shipment is not such a delivery to the carrier as makes it liable for the loss of the cotton by fire several hours before the arrival of the train which in the regular course of business would have transported it to its destination.

**CARRIERS—LIABILITY—DELIVERY OF GOODS.**—Unless bound by contract, a carrier is not responsible for the safety of articles intended for shipment until a delivery of them to him and an acceptance thereof, and there can be no acceptance until he has knowledge of their readiness for transportation and the shipper's desire therefor.

F. R. Montgomery, Jr., for the appellant.

J. M. Dickinson and Mayes & Harris, for the appellee.

**848** **TERRAL, J.** The appellee in this case recovered judgment by a peremptory instruction, and the appellants insist that a peremptory instruction should have been given in their behalf. On the 28th of September, 1897, the appellants loaded upon a car of the defendant company, at Clack's station, twenty-four <sup>849</sup> bales of cotton. The loading of the car was finished after sundown, and after the local freight train of that day, which was accustomed to take loaded cars from Clack's, had passed on its return trip to Memphis, and no other local freight train, by which alone cotton was shipped from Clack's, would arrive at said station until the evening of the next succeeding day. Early on the morning of the 29th of September the carload of cotton was wholly consumed by fire, and this suit, being a consolidation of five suits, is to recover its value. Tate & Co. operated a public gin at Clack's, where the defendant company had a siding, but it had no station-house or agent at that point. Japson and Keesee, who were in charge of Tate & Co.'s gin and plantation at Clack's, testified that when it was desired to ship cotton, one of them would inform the conductor of the local freight train, and the conductor would set out there an empty car for loading, and that when the car was loaded and ready for transportation, the local freight train desired to take the loaded car would be flagged, and the conductor of it informed that the car was ready for transportation, when the conductor would sign the shipper's loading account, if found correct, and attach the car to his train, and transport it to its destination. The contention of the appellants is that they had delivered the twenty-four bales of cotton to the defendant company, and that the cotton was burned while in its custody; that the cotton was actually or constructively delivered to the railway company, and that it is chargeable for the loss. We think, however, that it is quite clear that the railway company had never come into the possession of the cotton for transportation. The car, it was true, was the car of the company, and it was placed upon the company's siding at Clack's for being

loaded, and the cotton was loaded into the car, but no servant of the company had any notice of the car being loaded and ready for shipment. Keesee testifies that his recollection was (the trial being had some time after the loss), that, when the car was loaded, a man was left there with it, with the shipping <sup>850</sup> account filled out, in order to stop the train and get the conductor's receipt for it. And it appears that the flagging of the local freight train and delivery of the shipper's loading account to the conductor was an essential feature of the shipping of cotton at Clack's. But Japson and others conclusively show that the local freight train for that day had already passed before the car was loaded, and no other train that could have been expected to take the car would come by there until after the car was burned. There was no constructive delivery of the cotton to the railroad company. Its proper servant, the conductor of the local freight train, by which it was desired to have this cotton transported, knew nothing of its being loaded into the car for shipment, and there could be no acceptance of the cotton for shipment without such knowledge, unless, indeed, there had been an agreement between the parties making the mere loading of the car an acceptance of the freight for transportation. But no such agreement was shown. On the contrary, the clear course of dealing between the parties at Clack's showed that the shipper was to flag the proper local freight train, and deliver to the conductor of the train the car to be transported, with the shipper's loading account thereof. A bill of lading is not essential to charge the carrier with the duty of safely transporting the property delivered for carriage, but the doing of the several acts entitling the shipper to a bill of lading is necessary to charge the carrier with the safety of the articles intrusted to him. In this case, according to the course of dealing between the parties, there could have been no delivery of the cotton to the railroad company, until it was loaded and the local freight train conductor had notice of the items of freight, its destination and of its readiness for transportation. Parties desiring to hold common carriers to a stricter responsibility than that imposed by the common law should provide therefor by contract, for, unless bound by contract, otherwise a carrier is not responsible for the safety of articles intended for shipment until a delivery of them to him, and an acceptance thereof, <sup>851</sup> and there can be no acceptance until he has knowledge of their readiness for transportation, and the shipper's desire therefor: Hutchinson on Carriers, c. 4; Schouler on Bailments and Carriers, c. 3; Angell on Carriers, c. 140;



2 Kent's Commentaries, \*608; Illinois Cent. R. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301, 303.

Affirmed.

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**Carrier.**—Delivery to, and acceptance by, a carrier are essential to make him liable for goods: Merriam v. Hartford etc. R. R. Co., 20 Conn. 354, 52 Am. Dec. 344. His liability commences with delivery to him or his agent at a place where the carrier is accustomed to receive goods, or where in individual cases he agrees to receive them: Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783. The mere issuing of a bill of lading does not transfer the possession of freight to a carrier: Illinois Cent. R. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301; Amory Mfg. Co. v. Gulf etc. Ry. Co., 89 Tex. 419, 59 Am. St. Rep. 65, 37 S. W. 856. But when a shipper surrenders the entire custody of his goods to the carrier for immediate transportation, who accepts them, his liability at once commences. It matters not how long or for what causes he may delay putting the goods in course of transportation: Railway Co. v. Murphy, 60 Ark. 333, 46 Am. St. Rep. 202, 30 S. W. 419.

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### HODGE v. BENNETT.

[78 Miss. 868, 29 South. 766.]

**DEEDS—AMBIGUITY IN DESCRIPTION.**—A deed conveying a specific parcel of land out of a larger tract is void if, because of a patent ambiguity in the description, the location of the tract granted cannot be certainly ascertained.

**DEEDS CREATING COTENANCY—DESCRIPTION.**—A conveyance of a definite number of acres or any other definite quantity of land, parcel of a larger tract, if the amount conveyed is not located by the deed, conveys an undivided interest in the larger tract, and vests the grantee with title thereto as tenant in common in the whole in the proportion that the smaller bears to the larger tract.

Complainants claimed to own the land in dispute, one-half by inheritance from one Hodge and the other half as devisees under the will of Martha Goodloe, deceased. Defendant, by cross-bill, claimed to own, and set up a deed by said Martha Goodloe, executed in her lifetime to him, to "an undivided three hundred acres in and to the following lands," describing the lands in dispute by survey, description, and containing eight hundred and eighty acres. Complainants demurred to the cross-bill, and appealed from a decree overruling their demurrer.

W. H. Powell, for the appellants.

H. B. Greaves, for the appellee.

<sup>869</sup> WHITFIELD, C. J. If a grantor intending to convey a specific tract, precisely described by metes and bounds, such specific tract being part <sup>870</sup> of a larger tract of land, puts in the conveyance such a description of the specific tract as is ineffectual to convey that particular tract, because of a patent ambiguity, the grantee takes nothing, for the obvious reason that, in such case, the intention was to convey this specific tract, so definitely marked out. and nothing else, and the deed, failing as to that, fails altogether. But if a grantor intending to convey, not a specific tract of land particularly described, but to convey a certain quantity or number of acres of land out of a larger quantity or larger number of acres of land, makes a deed to such quantity or number of acres out of a larger quantity or number of acres of land, the grantee does take an undivided interest in the whole land as tenant in common with the grantor, and his interest is measured by the proportion which the number of acres conveyed to him bears to the whole number of acres in the tract. And this interest he may have set apart to him in severalty by proper partition proceedings. This is the well-settled rule.

In the case of *Grogan v. Vache*, 45 Cal. 612, the court say: "The only question which we shall notice is, whether the deed operated so as to make Thompson a tenant in common with the plaintiff in the whole ranch. The only authorities on which the defendant relies in support of that proposition are *Schenk v. Evoy*, 24 Cal. 110, and *Lawrence v. Ballou*, 37 Cal. 520. The deed in question in *Schenk v. Evoy*, conveyed one thousand acres of land situated in a certain valley, parcel of a certain ranch, to be bounded on the east by a certain creek, and to be laid out as near as possible in a square form, so as to include one thousand acres, and no more. It was shown that such a tract could be laid out in many different places within the valley and on the ranch. The deed was construed as conveying a given quantity of land, parcel of the ranch, and not as a defective conveyance of a given tract of land. The effect of the deed was to make the grantee a tenant in common with the owners of the ranch, or, at least, of so much of it as was situated in the valley <sup>871</sup> named in the deed. The deed in *Lawrence v. Ballou*, 37 Cal. 510, conveyed 'fifteen acres of the Hatch claim, situated on the Potrero Nuevo, which said fifteen acres is undivided,' and it is obvious that if the grantor held any title in the Hatch claim, the grantee, by virtue of the deed, took

an interest in common in the claim. In *Jackson v. Livingston*, 7 Wend. 136 (affirmed in *Corbin v. Jackson*, 14 Wend. 619, 28 Am. Dec. 550), the deed called for six hundred acres, to be surveyed and taken off of a larger tract by the grantee at his election, and it was held that the grantee became a tenant in common with the owners of the larger tract, and so remained until the tenancy in common was severed by the grantee by the exercise of his election to locate the quantity granted to him. There are many other cases to the same effect. A conveyance of a definite number of acres or any other definite quantity of land, parcel of a tract containing a larger number of acres or a larger quantity of land, if the amount conveyed be not located by the deed, is construed as conveying an undivided interest in the larger tract, for such is the manifest intent of the parties, and the construction is the same whether the interest conveyed be measured by acres or by a fractional subdivision, such as a half, a quarter, or the like."

In *Gibbs v. Swift*, 12 Cush. 393, the grantor conveyed to the grantee "two hundred and eleven undivided acres of land out of a tract of eighteen hundred and seventy-eight acres." The judge, the great Chief Justice Shaw, at pages 397 and 398, says: "We are, then, brought to consider the terms of this deed, what was the nature and character of the estate given by it and the rights and obligations of the parties under it. It certainly was not a joint estate. It had none of the characteristics of a joint estate. The grantor had formerly owned the whole, and let in the grantee to a part, which is described. It was no share or aliquot part in severalty, for it was not located on any part of the tract. It was, in terms, a given number of undivided acres, two hundred and eleven, out of a tract described as containing eighteen hundred and seventy-eight acres, in quality and privileges equal in every respect with the remainder. Whether such grant gave the grantee an <sup>872</sup> election to take his grant in any part of the tract, it is not necessary to decide, for he made no such election. But it gave him a share, as tenant in common, of the whole tract, in the proportion which two hundred and eleven bears to eighteen hundred and seventy-eight."

The same doctrine is set forth in *Sheafe v. Wait*, 30 Vt. 736, 737, the court saying: "The conveyance must be regarded as a deed of an undivided interest, or else be void. If the deed had been expressed thus, 'thirty-six acres of undivided land in said lot,' no question could have arisen but that it would have been a grant of undivided land, to be held in common."



There is nothing in the case of *Swayze v. McCrossin*, 13 *Smedes & M.* 320, or in the other cases cited for appellant, which contravenes this doctrine.

Affirmed.

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**Deeds—Description.**—Courts should uphold rather than destroy deeds, and in the discharge of their duty in this respect errors in description are frequently declared to be of no effect: *Sherwood v. Whiting*, 54 *Conn.* 330, 1 *Am. St. Rep.* 116, 8 *Atl.* 80. But if the description is too indefinite to convey anything, then the paper on its face lacks one of the essentials of a conveyance: *Barker v. Southern Ry. Co.*, 125 *N. C.* 596, 74 *Am. St. Rep.* 658, 34 *S. E.* 701. A deed conveying one-half of a tract of land "containing fifty-two acres and eighty rods, and no more, and including the salmon fishery contiguous to said land," conveys only an undivided half of the fishery: *Duncan v. Sylvester*, 24 *Me.* 482, 41 *Am. Dec.* 400.

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## SHINGLEUR-JOHNSON & CO. v. CANTON COTTON WAREHOUSE COMPANY.

[78 *Miss.* 875, 29 *South.* 770.]

**WAREHOUSEMEN'S LIENS** do not give a right to retain goods in the warehouse for a balance of accounts relating to similar dealings.

**WAREHOUSEMEN'S LIENS — HOW LOST.** — A warehouseman's lien is specific or particular, attaching only upon each separate bailment, and is lost when the articles of each separate bailment are delivered to the bailor or his assignee, although the storage charges remain unpaid.

**WAREHOUSEMEN'S LIENS.—STATUTES GIVING LIENS UPON CROPS** to all who aid in their preparation for market or sale do not entitle warehousemen to liens on cotton in the bale and being handled in the market.

**WAREHOUSEMEN—RIGHT OF HOLDER OF RECEIPTS TO RECOVER GOODS.**—A purchaser of goods who holds the warehouse receipts issued therefor may maintain replevin against the warehouseman therefor, although such receipts are not indorsed by his vendor, and provide that the goods are to be delivered only on the receipts properly indorsed.

H. B. Greaves, for the appellant.

W. H. Powell, for the appellee.

**878 TERRAL, J.** The appellant sued the appellee in replevin for fifty-nine bales of cotton, and before suit brought demanded the delivery of the same, and offered to the warehouse company all storage and other charges thereon, amounting to one hundred and twenty-four dollars and fifty-five cents,

upon said cotton. The warehouse company refused the delivery of the cotton unless appellant would pay it the storage and other charges on seventy-nine bales of cotton previously delivered by appellee to appellant, amounting to one hundred and sixty-two dollars and eighty-nine cents. For some reason appellant declined to pay the charges on the previous bailments. It appeared from the evidence that a separate receipt was given for each bale of cotton, and there was no connection between the bailment of the fifty-nine bales of cotton sued for and the prior bailment of the seventy-nine bales of cotton, upon which one hundred and sixty-two dollars and eighty-nine cents was claimed as charges. A judgment was rendered against appellant for the expenses on the seventy-nine bales of cotton, as well as that on the fifty-nine bales sued for. In that respect, it is claimed that the court erred.

1. The contention of the appellee that a warehouse lien is a general lien and gives a right to retain for a balance of accounts relating to similar dealings is not to be maintained. It is a common-law lien, which is the creature of policy, and is a specific or particular lien, which attaches only upon each separate bailment, and is lost when all the articles of each several bailment are delivered to the bailor or his assignee: *Angell on Carriers*, sec. 66, and notes; *Scott v. Jester*, 13 Ark. 446; *Steinman v. Wilkins*, 42 Am. Dec. 257; *Northrup v. Bank*, 27 Ill. App. 529.

2. The contention that a warehouseman, under section 2682 of the code of 1892, has a lien on cotton raised in this state for storage and other charges connected therewith is not supported by any reasonable construction of that section.

879 The cotton here was not in the warehouse to prepare it for market, but was at the market, and was there for sale or shipment, and the charges claimed were incident to the handling of the cotton then in the market. It is not covered, we think, by section 2682.

3. On the delivery of each bale of cotton at the warehouse by the farmer bringing it in for sale, a receipt was given, of the following tenor:

"No. —.

"Received of — one bale of cotton, in apparent good order. Mark, —. No. —. Weight, —. Remarks, —.  
—, Manager.

"Responsible for loss or damage by fire or water. This bale of cotton to be delivered only on receipt properly indorsed."

It is not denied but that appellant had bought the fifty-nine bales of cotton from the owners and had received these unindorsed receipts as a symbolical delivery of the bales of cotton; that, as between the bailor and the assignee, the property was intended to be passed to the assignee by the delivery of the unindorsed receipts. The intention of the parties gives effect to their acts as a valid transfer of the property: *Allen v. Williams*, 12 Pick. 297; *First Nat. Bank v. Dearborn*, 115 Mass. 219, 15 Am. Rep. 92; *Bank v. Ross*, 9 Mo. App. 399; *Lickbarrow v. Mason*, *Smith Lead. Cas.*, 8th ed., 1209.

However, no objection was made in the court below to the receipts because not indorsed, and the objection comes too late when made here for the first time.

The appellant, upon the case as made by the record, was entitled to recover the fifty-nine bales of cotton, the charges on which had been tendered, with all costs.

Reserved and remanded.

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The Lien of a Warehouseman is specific, not general, and is lost when possession is surrendered to the owner: See the monographic note to *Steinman v. Wilkins*, 42 Am. Dec. 257-260.

When Replevin is Sustainable is the subject of the monographic note to *Sinnott v. Felock*, 80 Am. St. Rep. 741-767.

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## SHANNON v. GEORGIA STATE BUILDING AND LOAN ASSOCIATION.

[78 Miss. 955, 30 South. 51.]

**USURY—CONFLICT OF LAWS.**—If, according to the real intent of the parties as disclosed by their contract, payment thereof is to be made within the state, its usury laws are applicable thereto, although the contract provides for its payment in another state.

**USURY—FOREIGN CORPORATIONS—CONFLICT OF LAWS.**—A building and loan association organized in one state and engaged in doing business in another, is permitted therein to charge no higher rate of interest than is chargeable under the laws of the latter state, and while, by the law of comity, the charter of such corporation is recognized as the law of its existence, yet if it employs the usual agencies to solicit and transact business in the latter state and contracts for the payment of premiums and interest in excess of the authorized rate, the transaction must be denounced as an attempted evasion of the laws of that state, whatever be the nominal rate specified or artifice adopted, and this



though it be specifically provided that the contract is made with reference to the laws of another state.

**USURY — FOREIGN CORPORATIONS — CONFLICT OF LAWS.**—Foreign corporations wishing to do business other than that for which they are organized, and localizing that business therein through local boards, must comply with the law of the state. They cannot, under such circumstances, enforce there stipulations in contracts allowed by the law of the state of their creation, if such stipulations violate the laws and public policy of the other state. The law of the state of the creation of such corporations can have, *ex proprio vigore*, no extraterritorial effect, and the corporations whose business has been localized in another state and the borrower, or both, cannot abrogate, by attempted contract, stipulations whose purpose it is to evade the laws against usury.

**USURY — FOREIGN CORPORATIONS — CONFLICT OF LAWS.**—If a foreign money lending corporation has localized its business in another state through local boards, doing there continuously and regularly for several years the business of the corporation, it thus voluntarily domesticates itself within that state, and subjects its business and contracts to the operation of its laws, and if, from all the facts, it appears that the only purpose of stipulations in notes on mortgages for their payment in another state is to evade usury laws, no device, disguise, or contrivance resorted to for that purpose can be effective.

Action to recover usurious interest paid on a note secured by mortgage. Judgment for defendant. Plaintiff appealed.

Shannon & Street, F. Johnston, and Sterling & Harris, for the appellant.

Williamson, Wells & Croom, and Hardy & Howell, for the appellee.

964 **WHITFIELD, C. J.** It is thoroughly settled in this state, under facts like those in this record, that the appellant can recover the whole of the interest: *McAllister v. Jerman*, 32 Miss. 142; *Chaffe v. Wilson*, 59 Miss. 42. The appellant stood as a substituted debtor, and had all the rights the original debtor had. The premium in this case was fixed, and the contract was, therefore, usurious: See the cases of *Sokoloski v. New South etc. Assn.*, 77 Miss. 155, 26 South. 361, and *Crofton v. New South etc. Assn.*, 77 Miss. 166, 26 South. 362.

The chief point of contention is whether this is a Georgia or a Mississippi contract. It is true the notes were payable in Georgia, but the mortgage was on land in Mississippi and the debtor lived in Mississippi, where alone the mortgage could have been enforced. All the payments, through a series of years, were actually made in Mississippi, instead of Georgia, to the local treasurer here, and it is manifest it was intended

they should be made here. This foreign corporation had the power to organize local boards throughout Georgia and other states. It did organize a local board, thoroughly officered, at Ellisville, in this state, and to the local secretary and treasurer of this board all payments were made by the appellant and his vendor, and by other members of this association, through a series of years.

It is obvious that this foreign corporation has thus localized <sup>965</sup> its Mississippi business within the state of Mississippi. It is not a case of a nonresident money-lender, or a foreign corporation, in a few isolated cases, dealing with our citizens and taking notes payable in the state of the domicile of such person or corporation. It is the case of a localization within this state of a large business done by a foreign corporation on the faith of mortgages on land in this state, the payments to be made to the secretary and treasurer of their respective local boards scattered throughout the state. Wherever, under circumstances such as these, the foreign corporation, thus localizing its business within this state, has the payments made to the secretary or treasurer of a local board, the real intention of the parties is that the payments shall be made in this state, and the only purpose of reciting the contrary in the notes is to evade the usury laws of this state. The contract is a Mississippi contract according to the real facts and the real intention of the parties. Courts look through all disguises to the real case made by the actual facts. This proposition is abundantly supported by the authorities. In the precisely parallel case of Building etc. Assn. v. Griffin, 90 Tex. 488, 39 S. W. 659, the court says: "It, therefore, became domiciled in the state the same as an individual would, who came here for the purpose of doing a like business and yet retained his citizenship in the state from which he came. The borrower lived in Texas; all of the property that he owned, so far as we know, was situated in this state; at least, there is nothing to indicate that he owned property in the territory of Dakota. To secure the payment of the debt a deed of trust was taken upon property situated in this state. Upon these facts the question is to be determined whether or not the contract, under the evidence and surrounding circumstances, was really intended to be performed in the territory of Dakota or in the state of Texas.

"The general rule of law contended for by the loan company, that a contract which is to be performed in a state other

than that in which it is made, may reserve interest, according <sup>906</sup> to the laws of either state, is too well settled to require discussion or the citation of authority; but the law looks to the substance of the contract, and will not tolerate any contrivance by which it is intended to evade the laws of a state in which the contract is made or sought to be enforced. The fact that the contract expresses that the money borrowed is to be paid in the territory of Dakota is met by the real substantial provisions for its enforcement, and the circumstances under which the business was transacted, with such overwhelming force, that we are brought to the conclusion that the contract, in so far as it provided by its terms for payment of the money in the territory of Dakota, was simply a device to evade the laws of this state, and that these facts are so manifest from the face of the papers themselves, that it ceases to be a question of fact, but becomes a matter of law, to be determined from the undisputed evidence that is thus furnished. The contract having been made with a view to its enforcement in the state of Texas, and not in the territory of Dakota, the agreement expressed in it, that it should be paid in the territory of Dakota, was intended to enable the loan company to do business in Texas, by authority of the laws of this state, and set our laws at defiance with impunity, and it cannot be enforced by the courts of this state: *Tyler on Usury*, 83; *Miller v. Tiffany*, 1 Wall. 298; *Falls v. United States Sav. etc. Co.*, 97 Ala. 417, 38 Am. St. Rep. 194, 13 South. 25; *Meroney v. Atlanta etc. Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, 12 S. E. 924; *Martin v. Johnson*, 84 Ga. 481, 10 S. E. 1092; *Fowler v. Bell*, 90 Tex. 150, 59 Am. St. Rep. 788, 37 S. W. 1058."

In *Meroney v. Atlanta etc. Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, 12 S. E. 924, the court say, at page 887 of 116 N. C. (47 Am. St. Rep. 845, 21 S. E. 926): "It is important that foreign capital invested within our borders shall have, to the very utmost, its just dues, and that it shall find our courts ready now, as they always have been, to protect its interest and enforce all its lawful rights. But it is important also that the settled policy of the state should be upheld by its courts, and that schemes, which to them seem manifestly adopted merely to evade its usury laws, should not <sup>907</sup> be allowed to bring about virtual abrogation of those statutes.

"If a foreign bank or other lender of money may establish local branches or offices in this state, and through its agents solicit and take application for loans on mortgages of land here,



to be sent to the home office to be passed upon and allowed there; and if, because of such arrangement and the insertion of a statement, put in the note or mortgage, that the contract is 'solvable' in the foreign jurisdiction and is made 'with reference to its laws,' the courts of this state are required to enforce such contracts, and decree a foreclosure of the mortgage and a sale of the land, that the foreign usurer may have his usury, then surely will it have come to pass that it is no longer true that there is no 'cover or device' by which the wholesome restraints put upon the money-lenders by our statutes may be escaped.

"Upon this subject there is in *Martin v. Johnson*, 84 Ga. 481, 10 S. E. 1092, a most emphatic declaration from the highest court of the state that is the domicile of the defendant corporation. A loan of money had been made by a citizen of Massachusetts, through an agent in Georgia, to a citizen of the latter state, secured by mortgage on land there, but payable in the former state. It was contended that the rights of the mortgagee were not to be governed by the laws of Georgia in respect to usury because the note was payable in Massachusetts. The court said: 'If this court should hold that a note made in this state, but payable in the state of Massachusetts, for money advanced by the agent of a person who resides in Massachusetts, could be collected notwithstanding it contained sixteen per centum usurious and unlawful interest, then the law of this state as to usury would be inoperative and useless; the money-lenders of those states that have no usury laws, but which allow to be collected any rate of interest contracted for, could flood this state with their agents and by the loan of money exact the highest rate of interest, even a hundred per centum.

968 "It seems, therefore, that the principle for which the defendant corporation contends is denied in the courts of its own domicile—that a foreign money-lender, loaning money in Georgia on mortgage on Georgia land, must be content in a foreclosure proceeding to have the amount due determined by Georgia law.

"The reasons that support the rule there are valid here. The rule of comity requires us to allow foreign corporations a standing in our courts to enforce the valid contracts they may have made with our citizens, and all such liens upon property situated within this state as they have lawfully acquired. But that comity does not require that we should allow foreign corporations to enforce contracts here, if such enforcement would

be in conflict with our laws, and, being thus in conflict, the enforcement thereof would work against our own citizens and give to the foreigner an advantage which the resident has not: *Walters v. Whitlock*, 9 Fla. 86, 76 Am. Dec. 607. Much less does it require that we should allow a Georgia corporation to enforce a mortgage loan which is illegal and void by our laws (*Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717), while in that state the rule is as stated in *Martin v. Johnson*, 84 Ga. 481, 10 S. E. 1092.

"It is well settled—so well settled that authorities need not be cited—that a purely personal contract, made in one place to be executed in another, is to be governed by the laws of the place of performance. This general rule is subject to the qualification that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character: *Tyler on Usury*.

"Now, it seems very manifest to us, considering all the facts and circumstances, that this Georgia corporation required the plaintiff, a citizen and resident of this state, to declare, in the obligation given by him to it for the money loaned him, that the contract was solvable in that state and was made with reference to its laws, not because it was contemplated by either of the parties that the money would be paid there, or that the <sup>669</sup> parties would enforce their respective rights under the contract in the courts of that state, but because this money-lender desired to escape the restraints of the laws of this state, and, by this formal declaration inserted in the contract, compel the courts of this state, in a suit for the foreclosure of the mortgage, to adjust the rights of the parties according to the laws of Georgia and the decisions of its courts, and in disregard of the laws of this state and the decisions of this court."

In *Fletcher v. New York Life Ins. Co.*, 13 Fed. 528, Judge Teat says: "The defendant company was doing business in Missouri, with the privileges granted to it here, when said insurance was effected. It may be that the formal acceptance of the proposed contract was, by the letter of the contract, to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri, for salutary reasons, permit foreign corporations to do business in the state on prescribed conditions. If, despite such conditions, they can, by the insertion of clauses in their policy, withdraw themselves from the limitations of the Missouri statutes, while obtaining all the advantages of its

license, then a foreign corporation can, by special contract, upset the statutes of the state and become exempt from the positive requirements of law. Such a proposition is not to be countenanced. The defendant corporation chose to embark in business within this state, under the terms and conditions named in the statute. It could not by paper contrivances, however specious, withdraw itself from the operation of the laws, by the force of which it could alone do business within the state. To hold otherwise would be subversive of the right of state to decide on what terms, by comity, a foreign corporation should be admitted to do business, or be recognized therefor, within the state jurisdiction. Each state can decide for itself whether a foreign corporation shall be recognized by it, and on what terms. Primarily, a corporation has no existence beyond the territorial limits of the state creating it, and when 970 it undertakes business beyond, it does so only by comity. The defendant corporation, having been permitted to do business in Missouri, under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses in its forms of application, etc., withdraw itself from the obligatory force of the statute. The contract of insurance, therefore, is a Missouri contract and subject to the local law."

This last utterance is in exact accord with the holding of this court in *Western Assur. Co. v. Phelps*, 77 Miss. 625, 27 South. 745. See, also, *Southern etc. Assn. v. Atkinson*, 20 Tex. Civ. App. 516, 50 S. W. 170, and *Neal v. New Orleans etc. Assn.*, 100 Tenn. 607, 46 S. W. 755. See especially the very recent case of *Crippen v. Loughton*, 69 N. H. 540, 76 Am. St. Rep. 192. 44 Atl. 538.

And it is immaterial whether the foreign corporation is doing business under a license here or has, without such license, localized its business and domesticated itself here as to such business. And the acts of 1890, page 10, places "each branch office" and "each agency" on the same footing exactly, treating each as a separate and distinct building and loan association, and taxes each as such.

The general doctrine is, of course, well settled that the law of a place where the contract is to be performed governs the contract; and the presumption that this contract was to be performed according to the laws of Georgia, simply because the notes were payable in Georgia, is, at last, nothing but a mere presumption to that effect, subject to be overcome by proof



that, in truth and in fact, they intended the money to be paid in Mississippi. When all there is, in a case like this, to show that the intention was to perform the contract in a foreign state, is a mere specious paper recital in the notes, and over against this, and contrary to this, are all the other facts in the case, and the whole course of dealing between the parties, it would be an abdication of common sense on the part of any court to find the real intention of the parties in the paper recital, instead of in the real facts of the case.

971 It must be remembered that the state has the power to prescribe the terms on which foreign corporations may do business. It is declared in section 849 of the code of 1892, last clause, "such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy." This is the plain mandate of our law, which must be rigidly enforced by the courts. And the code otherwise provides that (section 2348) domestic building and loan associations are excluded from the operation of the usury laws, but foreign building and loan associations are subject to them, and to enforce this public policy, thus declared by the statute, is not to give extraterritorial operation to our statutes. On the contrary, this corporation has come into the state, localized its business here, through local boards scattered all over the state, and must submit such business thus localized to the operation of the laws of the state. To hold otherwise would operate the grossest injustice to our citizens and would virtually abrogate our statutes against usury.

It may be further remarked that we announce, as to this foreign building and loan association the identical doctrine which the state of Georgia, through its supreme court, has announced (*Martin v. Johnson*, 84 Ga. 481, 10 S. E. 1092) in an exactly similar case.

We append, for convenience, a few of the authorities supporting our views, whose reasoning we approve, so far as relates to the question under discussion: *United States etc. Assn. v. Scott*, 98 Ky. 695, 17 Ky. Law Rep. 1244, 34 S. W. 235, decided in 1896, the court saying: "A foreign building and loan association engaged in doing business in Kentucky will be permitted to charge no higher rate of interest than is chargeable under the laws of this state; and while, by the laws of comity, the charter of such a corporation will be recognized here as the law of its existence, it is the charter alone which is recognized,

and not the general legislation of the country of its domicile with reference thereto,<sup>972</sup> or the construction of its charter provisions by the foreign courts. Moreover, when such a corporation employs the usual agencies to solicit and transact business in this state, and contracts for the payment of premiums and interest in excess of the rate authorized here, the transaction will be denounced as an attempted evasion of our laws, whatever may be the nominal rate specified or artifice adopted; and this, though it be specifically provided that the contract is made with reference to the laws of the foreign state. Such a provision only makes the intent to evade the more manifest": *Pryse v. People's etc. Assn.*, 19 Ky. Law Rep. 752, 41 S. W. 574, decided in 1897, these two being Kentucky cases; *National etc. Co. v. Stone* (Tex. Civ. App.), 46 S. W. 67, decided in 1898, a Texas case. It was held therein that it was immaterial whether the association had obtained a permit or license to do business in Texas, if, in fact, it had localized its business there. In such latter case the contract was a Texas contract as well as in the former.: *Harmon v. Hart*, 53 S. W. 310, a Tennessee case, decided in 1899; *Jackson v. American Mortgage Co.*, 88 Ga. 756, 15 S. E. 812; *Thompson v. Edwards*, 85 Ind. 414; 4 Am. & Eng. Ency. of Law, 2d ed., 1072, note 5. *Crippen v. Leighton*, 76 Am. St. Rep. at pages 196, 197, where the court says: "In the case of contracts the common law enforces the contract made by the parties, but not the *lex loci*, except in so far as they have made it a part of the contract. The doctrine that contracts are to be interpreted according to the law of the place where they are made or to be performed, is merely a rule for finding the intention of the parties": *Peninsular etc. Co. v. Shand*, 3 Moore P. C., N. S., 272; *Anstruther v. Adair*, 2 Mylne & K. 513. "A different decision would totally defeat the intention of the contracting parties": *Di Sora v. Phillips*, 10 H. L. Cas. 624, 638, 639. The only purpose of the proof of the foreign law is to determine the meaning of the language used by the parties for the same reason precisely that evidence is heard of the signification of technical terms: *Prentiss v. Savage*, 13 Mass. 20, 23; <sup>973</sup> *Koster v. Merritt*, 32 Conn. 246; *Dyke v. Erie Ry. Co.*, 45 N. Y. 113, 118, 6 Am. Rep. 43.

The foreign law, as such and *ex proprio vigore*, has no effect. Effect is given to the agreement of the parties only. The court looks into the *lex loci* so far, and only so far, as may be necessary to determine what the contract is, and whether it shall be enforced, if at all, according to the intention of the

parties. This is not a matter of courtesy or favor, either to the country where the contract was made or to the parties. It is the right of the parties, it is as if the foreign law were in terms expressed in the contract. The principle 'loosely called comity' (*Schibsby v. Westenholz*, L. R. 6 Q. B. Div. 155, 159) is not of courts, but of nations: *Story's Conflict of Laws*, secs. 37, 38; *Bank of Augusta v. Earle*, 13 Pet. 519, 589.

"The question of the enforcement of the laws of a foreign state is not a question of comity to the state, but of the power of the courts of the forum. The organic, or statute, or common law of no state in the Union has conferred upon its courts authority to put into active operative effect, efficient per se, the statutes of another state. There is a wide difference between putting a foreign statute in active operation and treating a transaction of which the court has jurisdiction as it is modified, affected, or characterized by the law that operated upon it where it took place. To enforce a liability created solely by the statute of a foreign land is to give that statute precisely the same force and effect as if it were a statute of the forum": *Falls v. United States etc. Co.*, 97 Ala. 417, 38 Am. St. Rep. 194, 13 South. 25; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68, 96 Am. Dec. 331.

In the cases in 46 S. W. and 34 S. W., supra, there was no local board, as in this and the *Sokolosky* cases, but the foreign corporation had local offices and local agents, and had thus localized its business, and the same rule above announced was applied—a point not here presented. The principle is much like that of *Jahier v. Rascoe*, 62 Miss. 699; *Rorer on Interstate Law*, 48, quoted in *Thompson v. Edwards*, 85 Ind. 420, 421. It seems <sup>974</sup> that in 1898, carrying out the doctrine of these cases, where foreign corporations localized their business in other states, the state of South Carolina actually passed a law providing that "all contracts secured by mortgage of real estate situated within this state shall be subject to, and construed by, the laws of this state regulating the rate of interest allowed and in all other respects, without regard to the place named for the performance of the same": 22 S. C. Stats. 747; and the supreme court of that state, in *Tobin v. McNab*, 53 S. C. 76, 30 S. E. 829, pronounced this a "wise law."

Foreign corporations wishing to do business with our citizens, and localizing that business within our state through local boards, must comply with the laws of this state. They cannot, under such circumstances, enforce here stipulations in



contracts allowed by the law of the state which created them if these stipulations violate our laws or our public policy. Such laws of such foreign states can have, *ex proprio vigore*, no extraterritorial effect, and it is not competent for a foreign corporation, whose business has been localized in this state, or the borrower, or both, to abrogate, by attempted contract, stipulations whose purpose it is to evade our laws against usury, the laws of this state on that subject.

This holding in no way interferes with the right of a foreign corporation whose business has not been localized here to make contracts with borrowers, to be governed by the laws of the state of their domicile, if there be no purpose therein to evade the usury laws of this state. Such liberty of contracting, exercised in good faith, is not herein interfered with. The authorities cited to that point by counsel for appellee are not pertinent to cases like the one before us. All the cases are admirably collected in a note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 171. In that note the learned editor points out, on page 202, the distinction to be observed, saying: "The proper answer to this argument is, that mere shams and evasions are not permitted to counteract and annul the law, and <sup>975</sup> where it appears that the purpose of the parties in making the obligation payable in another state was to evade the law against usury of the state in which it was executed, it will be regarded as infected with usury: *Pratt v. Adams*, 7 Paige, 615; *Junction R. R. Co. v. Bank of Ashland*, 12 Wall. 226; *Andrews v. Ponds*, 13 Pet. 65."

Our decision is rested upon the two distinct grounds: 1. That where a foreign money-lending corporation has localized its business within this state, through local boards, doing here regularly and continuously for years the business of the corporation, it has thus voluntarily domesticated itself within this state and subjected its business and contracts to the operation of our laws; and 2. That where, in such case, all the facts, fairly weighed, show that the only purpose of a mere stipulation in the notes or mortgages for payment in the foreign state must have been to evade our laws on the subject of usury, no device or disguise or contrivance will prevent the court from stripping off the mask and pronouncing the judgment of the law on the real case made by the actual facts.

The proposition that the local secretary and treasurer is the agent, not of the lending corporation, whose secretary and

treasurer he was, but of the borrowing debtor, is utterly unfounded: *Murphy v. Independent Order of Sons and Daughters of Jacob of America*, 77 Miss. 830, 27 South. 624.

The facts of the case make *Natchez etc. Assn. v. Shields*, 71 Miss. 630, 15 South. 793, and *Building etc. Assn. of Jackson v. Leonard*, 74 Miss. 810, 21 South. 53, wholly inapplicable.

It is noteworthy that no dividends or profits are allowed by the by-laws of this association where the stock is surrendered before maturity. The appellant, so far from deriving any profits, actually lost nineteen dollars and fifty cents.

The judgment is reversed and cause remanded.

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**Usury.**—A loan by a foreign corporation to a citizen of another state, secured by mortgage on land in that state at usurious interest there, is governed in the settlement of interest on foreclosure by the law of the latter state, although the contract of loan and mortgage stipulates that it is solvable by the laws of the state of the domicile of the corporation, and is made with reference to its laws: *Meroney v. Atlanta etc. Loan Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924. Compare *Hale v. Cairns*, 8 N. Dak. 145, 73 Am. St. Rep. 746, 77 N. W. 1010; and see the monographic note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 200-202.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MISSOURI.**

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**STATE v. EVANS.**

[161 Mo. 95, 61 S. W. 590.]

**JURY—CHALLENGE FOR CAUSE—FORM OF.**—To merely challenge a juror "for cause" is insufficient; the cause of the challenge must be distinctly specified.

**OFFICER—WATCHMAN.—THE TERM "POLICEMAN" is** the legal equivalent of "watchman."

**OFFICER—POWER TO ARREST.—A POLICEMAN has** the same power of making arrests as a sheriff or constable, and in so doing is entitled to the same protection.

**ARREST FOR FELONY WITHOUT WARRANT.—IF A PEACE OFFICER** arrests without warrant, he will be justified in so doing although no felony is actually committed, if he has reasonable cause, either on his own knowledge of facts or on facts communicated to him by others, to suspect the one apprehended.

**MURDER IN RESISTING ARREST.—IF A SUSPECTED FELON, IN RESISTING ARREST,** or in endeavoring to escape after arrest, kills the arresting officer, he commits murder.

**HOMICIDE.—AN OFFICER WHO NECESSARILY KILLS A SUSPECTED FELON** when he resists arrest, or endeavors to escape, commits justifiable homicide.

**MURDER IN RESISTING ARREST—KNOWLEDGE OF OFFICIAL CHARACTER.**—One who is arrested by an officer in uniform, who is known to him, cannot justify the killing of such officer on the ground that he had no notice of the officer's official character.

**ARREST—FRESH PURSUIT—KILLING OFFICER—NOTICE FOR WHAT ARRESTED.**—One who is apprehended on fresh pursuit cannot justify his killing of the arresting officer on the ground that he was not notified for what he was arrested, since in such a case he is presumed to know the cause of his arrest.

**ARREST.—A PRIVATE PERSON MAKING AN ARREST FOR A PAST FELONY** need not give notice of the ground for the arrest, if the accused have notice aliunde.



**ARREST FOR FELONY—RESISTING—KILLING OFFICER.**—Where an officer, who has knowledge of a felony committed and of the one who committed it, is killed by such felon while making the arrest, the offense is murder.

**ARREST—RESISTING—REASONABLE SUSPICION OF FELONY—KILLING OFFICER.**—Where an officer arrests one for felony without a warrant upon reasonable suspicion, killing such officer, while resisting arrest or in attempting to escape, is murder in the first degree, even though no felony has been committed.

C. D. Corum and W. G. Pendleton, for the appellant.

Edward C. Crow, attorney general, and Sam B. Jeffries, assistant attorney general, for the state.

<sup>100</sup> **SHERWOOD, P. J.** For the murder of William L. Hennicke, a policeman of Boonville, by shooting him with a pistol, defendant, a negro, was put upon his trial, which resulted <sup>101</sup> in a verdict of guilty of murder in the first degree; judgment and sentence accordingly.

The homicide happened on this wise: A number of business houses in Boonville had been burglarized during the month of March of last year, which closed the nineteenth century, nor did the burglars neglect the cigar store of Louis Bernard; it had been burglarized three or four times in succession, the last time the night before, and the cash drawer each time depleted of its funds. On the night of the 26th of the month mentioned, John Bernard, the brother of Louis, remained at the cigar store of the latter, and with Henry Winklemeyer kept watch for the burglarious thief. He came about 10 o'clock and stopped at the front door two or three times for a moment, but seemed frightened away by passers-by, but finally, after the lapse of a few minutes, went up the steps, unlocked the door with a false key, walked away, came back, opened the door, walked in, leaving the door open about two inches, stood at the door holding the latch, when he seemed to take alarm from persons passing by, and was about to go out again, when Winklemeyer halloed to him to throw up his hands, whereupon defendant ran out through the door, closing it behind him. Winklemeyer and Bernard followed in close pursuit, and seeing defendant in front of Dan's drugstore, Winklemeyer shot at him once, when he disappeared. Thereupon, Bernard returned to the cigar store, closed it, and started home, when Officers Hennicke and Jones called to him across the street, asking him if he could recognize the burglar, when he replied he could; that it was "Jocko," and on being asked which one, answered "the

one that used to be on the bus a good deal." Bernard knew the negro well, and had known him for three or four years; and the light was such in the cigar store from neighboring establishments as to render recognition by Bernard of defendant, when in the cigar store, easy.

<sup>102</sup> Winklemeyer who was twelve feet from defendant when in the cigar store, though he had never known him before, had no difficulty in subsequently identifying him as the same man he had seen enter the cigar store. When Bernard was accosted by the police officers as aforesaid it was about 10:15 to 10:20 P. M. Hennicke then said to Bernard: "Well, I have some other stores to watch to-night, but we ought to catch him, and so I will go down to-night; I know where he stays." He says, "We will go down." So Officer Jones and Hennicke and Knack and myself, went down.

"Q. Adolph Knack? A Yes, sir. . . .

"Q. Where did you go? A. We went down to the house this side of the track, the old 'Sandrock' house, they call it.

"Q. You speak of the Missouri Pacific track? A. Yes, sir.

"Q. Where is that house situate with reference to the Missouri Pacific track—with reference to the depot? A. It is south of the track.

"Q. Just across the street is it? A. Yes, sir, just across the street.

"Q. Now what occurred there? A. Why, we went down there and the officers knocked on the door. The woman didn't want to let them in at first. She said she was in bed. So they told her they were looking for some one, to get up. She finally got up and opened the door and the officers went in.

"Q. Where were you at that time? A. I was standing out in front of the house, or steps. And as they were coming out, why, Evans came around between that hallway—there is a hallway between the two houses—him and some more young fellows and some women. And he stepped upon the step, and the officers came out; they put their hand on him, <sup>103</sup> and I says, "That is the man." And he said to the officers, "I didn't do anything." Hennicke says, "You will find out about it in the morning."

"Q. Well, they arrested him there did they? A. Yes, sir, he went, too, along with them. They walked down as far

as the track and went over to the Missouri Pacific depot and come up on the other side.

"Q. Now which side of that street would that be? A. That would be on the north side of the street.

"Q. As they went up the street how were they walking with reference to each other? A. Evans was in the middle between the two officers. Hennicke was on the north side of him, and Jones on the south side.

"Q. Well? A. Well, as they got in front of Deck's property down there, why, Evans had a deck of cards in his hands. And he said to Jones, 'Take these cards.' Handed them to Jones; Jones put them in his pocket. As he did, Evans jerked down his arm as if to get into his pocket or something. Jones says, 'No you don't.' And then they began tussling.

"Q. Where is that Deck property with reference to the Missouri Pacific depot? A. It is east.

"Q. Well, how many doors? A. Why, it is, I guess, one hundred and fifty feet from the depot.

"Q. This occurred about that far, then, from the depot? A. Yes, sir.

"Q. Which hand, if you remember, was the deck of cards in? A. Why, it was in this hand, the right hand.

"Q. Well? A. And they began tussling, and Evans pulled them into the alley.

"Q. How does the alley run there, Mr Bernard? A. Runs north and south.

"Q. Crosses Morgan street right there? A. Yes, sir.  
104 And they tussled up into the alley about fifteen feet and began tussling there against the fence, and swayed back, and finally a flash and a shot fired toward Jones, and a flash and the report was to Hennicke. But the first report was louder than the second report.

"Q. At this time where were you? A. I was standing at the mouth of the alley facing them.

"Q. They were, I understand, about fifteen feet in the alley perhaps? A. Yes, sir. . . .

"Q. From where you stood could you see the direction of these flashes? A. Yes, sir.

"Q. The first one went which way? A. Toward Officer Jones, and the other went toward Officer Hennicke.



"Q. The first, then, was toward the south, was it? A. Yes, sir.

"Q. And the second toward the north? A. Toward the north, yes, sir.

"Q. Well, did you hear any other shots fired there, Mr. Bernard? A. No, sir, just these two.

"Q. After you heard these shots, then what occurred? A. Why, in a second or two Hennicke fell forward right onto Evan's chest, looked like he was trying to throw him. And then they all three kind o' tussled over and fell with their heads this way."

Bernard then tells of defendant releasing himself from the officers, and making his escape, and of Hennicke dying in a few moments, in consequence of the shot he had received from defendant. Officer Jones also had his cheek grazed by the first shot fired by defendant. Defendant fled the city. He was captured the next morning by special officers, at a station twenty miles west of Boonville on the Missouri Pacific railroad.

Policeman Jones' account of the arrest is the following:  
105 "Then we walked out of the door and on the top step, just as we walked out the door, this man Jocko was standing at the door; and I put my hand on him about the same time that Mr. Hennicke did, and I said to him, 'You are just the fellow I am looking for. We want you.'

"Q. Did Mr. Bernard say anything at that time, about that time? A. And Bernard says, 'That is the fellow, that is the fellow.' And Jocko says, 'What do you want to arrest me for? I haven't done anything.' Mr. Hennicke says, 'Never mind about that. We will tell you all about that in the morning.' By this time we were at the railroad. Then we went north along the railroad—

"Q. Well, did you arrest the defendant there? A. We arrested him there, yes, sir.

"Q. And as you went to the railroad he was under arrest and in your custody, was he? A. He was under arrest at the top steps.

"Q. Well, go ahead, Mr. Jones. A. Then we got across to the north side of the street, and we went along there, possibly until we got in front of that gate, or in front of Mr. Preston's grocery store. He had a deck of cards in his hands, and he says to me, 'What will I do with these?' And I just took them—I had hold of his right arm—and I just took hold

of the deck of cards and shoved it in my overcoat pocket. By this time we were at the gate, that Jake Deck used to own the property—a man by the name of Bowers lives there now I think. Just as we got along that gate he commenced ramming his hand or trying to get his hand in his hip pocket.

“Q. Which hand? A. His right hand, the one I had hold of. Well, I says to him, ‘No, no, you can’t do that.’ And right there he began to fight and pull and drag, you know, to the corner of the alley.

“Q. And about how far was that from where he first <sup>106</sup> made his motion to his pocket? A. Well, it must be—I will say it is sixteen feet, anyway; maybe a little over that. Well, when we got to the alley he kept fighting and pulling, and me holding onto his wrist to keep his hand out of his pocket, until we went up the alley about maybe the same distance—until we struck a picket fence on the west side of the alley. The picket fence I judge to be about that high; struck me about here (indicating). Well, I and him, when we struck the fence, fell over the fence—that is, didn’t fall over completely, but bent way over the fence; and that is where my hold broke on his right hand.

“Q. Up until that time, you had been holding his right hand? A. Up until that time I had hold of his right hand. And both our hats fell off over the fence, and we both raised up about together, and as we did we were facing one another, and I thought he attempted to strike me with his fist that way (indicating)—only with his right hand—and I throwed up my hand that way (illustrating), and his gun went off and just left a little black streak up the side of my face here (indicating), and I could feel the heat of the powder or the flash of the gun against my face. Well, then, I grabbed him, grabbed underholds on him, and he twisted in my arms. That is when he shot the second time.

“Q. Now in which direction did he shoot that time? A. Well, he shot—Mr. Hennicke was to my left, and then when we were turned, and to Jocko’s right, and then I throwed him—

“Q. Where was Mr. Hennicke, you say, at that time? A. Mr. Hennicke was the other side of Jocko. Jocko was in between him and I. And he was on the north side and I was on the south side.

“Q. Well, tell the gentlemen of the jury whether or not the second shot went in the direction of Mr. Hennicke. A. The second shot I didn’t see no flash—yes, I saw the flash, but

107 it didn't sound loud. It was kind o' underneath, was low, between us like. It was a kind of a shot—low—didn't sound loud and clear like the other one did.

"Q. Well, did it go in the direction of Mr. Hennicke? A. Yes, sir; it went in the direction of Mr. Hennicke. Well, then I threwed this fellow very near across the alley.

"Q. You mean the defendant, do you?" etc.

Defendant on his part denied he was ever in Bernard's cigar store the night of the homicide. He also testified that after his captors had taken him about a hundred feet, he stopped and said to them: "I asked them what they was arresting me for?"

"Q. Who did you ask that? A. I didn't particularly ask either one of them; I just spoke, says, 'What are you arresting me for?'

"Q. Did they tell you? A. No, sir.

"Q. What did they do? A. After I asked them what they were arresting me for, Mr. Jones says, 'Come on here.' And I stopped and says, 'What are you arresting me for?' Mr. Jones says, 'Come on here.' I didn't come here. I stopped. As I stopped, Mr. Jones hit me up side the head.

"Q. What did Mr. Hennicke do? A. When he hit me up side the head I fell up against the side of him, and Mr. Hennicke pulled out his billy and commenced beating me.

"Q. Now, go ahead and state what occurred. A. Then they commenced beating me, then they got me down; and they were beating me, and when I got a show, I got up and fired a shot." That he shot because he was mad; and that he was mad because Hennicke and Jones were beating him. He also contradicts Jones and Bernard in other respects.

It is also in evidence that about a month prior to the homicide, Hennicke had arrested defendant for some offense, and while in jail defendant told the matron that Hennicke could never arrest him again alive.

1. In Regard to the jurors it is sufficient to say that under 108 the settled rule of this court it is the established law of this state, and has been ever since *State v. Taylor*, 134 Mo. 109, 35 S. W. 92, that the mere challenging a juror "for cause" will not do, that the cause of challenge must be as distinctly specified as the objection to the introduction to evidence.

2. Relative to the arrest of defendant: The power of a policeman to make the arrest in question is denied, reliance therefor being based on sections 5784 and 5788 of the Revised



Statutes of 1899. These sections relate to the powers and duties of policemen in cities of the third class, and authorize policemen to arrest without process for offenses committed in their presence against the laws of such city. But these sections do not in terms impinge upon the authority of policemen at common law to make arrests for crimes committed against the state. Bishop says: "If a person is walking the streets at night and the indications are that he has committed a felony, watchmen and beables have authority at the common law to arrest and detain him in prison for examination, though the proof of an actual felony committed may be wanting": 1 Crim. Proc., sec. 182. And he cites among others the case of *Lawrence v. Hedger*, 3 Taunt. 14, where a watchman arrested a man in the streets of London about 10 o'clock at night with a bundle in his hand, as to the contents of which he would not, or could not, tell, and he was held properly arrested, and that no action could be maintained against the watchman. Heath, J., observing: "At every Old Bailey session numbers of persons are convicted in consequence of their being stopped by watchmen while they are carrying bundles in this way." And Chambre, J., said: "In this case, what do you talk of groundless suspicion? There was abundant ground of suspicion here; we should be very sorry if the law were otherwise": See, also, Wharton on Criminal Law, 10th ed., sec. 415; 1 Russell on Crimes, 9th Am. ed., 733; *State v. Grant*, 79 Mo. 134, 49 Am. Rep. 218.

<sup>109</sup> Hale says: "There are certain officers and ministers of public justice, that virtute officii are empowered by law to arrest felons, or those that are suspected of felony, and that before conviction, and also before indictment. And these are under a greater protection of the law in execution of this part of their office upon these two accounts: 1 Because they are persons more eminently trusted by the law, as in many other acts incident to their office so in this; 2. Because they are by law punishable, if they neglect their duty in it.

"And therefore it is all the reason that can be, that they should have the greatest protection and encouragement in the due execution of their office, since their actings herein are not arbitrary, but necessary duties (not permissions), and under severe punishments in their neglect thereof.

"And hence it is that these officers that are thus intrusted may without any other warrant but from themselves arrest felons and those that are probably suspected of felonies; and if they be assaulted and killed in the execution of their office,

it is murder; and, on the other side, if persons that are pursued by these officers for felony or the just suspicion thereof may, for breach of the peace or just suspicion thereof, as night-walkers, persons unduly armed shall not yield themselves to these officers, but shall either resist or fly before they are apprehended, or being apprehended shall rescue themselves and resist or fly so that they cannot be otherwise apprehended, and are upon necessity slain therein because they cannot be otherwise taken, it is no felony in these officers or their assistants that upon inevitable necessity kill them, though possibly the parties killed are innocent, for by their resistance against the authority of the king in his officers they draw their own blood upon themselves.

"The officers that I herein principally intend are: 1. Justices of the peace; 2. Sheriffs; 3. Coroners; 4. Constables; <sup>110</sup> 5. Watchmen. And when I mention these I also include all that come in their aid and assistance; for every man in such cases is bound to be aiding and assisting these officers upon their charge and summons, in preserving the peace and apprehending of malefactors, especially felons": 2 Hale's Pleas of the Crown, 85, 86.

Besides, our statutes have given recognition in at least two instances, that the term "policeman," which is the legal equivalent of "watchman" at common law, are proper persons to make arrest in state crimes: Rev. Stats. 1899, secs. 2468, 8848. Such recognition in legislative enactments is tantamount to legislative authorization in express terms; and this principle is attested by many authorities: Bonds v. State, 1 Mart. & Y. 143, 17 Am. Dec. 795; Small v. Field, 102 Mo. 119, 120, 14 S. W. 815; Bow v. Allenstown, 34 N. H. 351, 69 Am. Dec. 489; People v. Perrin, 56 Cal. 345; State v. Cummins, 99 Tenn. 667, 42 S. W. 880; McCartney v. Chicago etc. R. R. Co., 112 Ill. 611; People v. President etc., 9 Wend. 351; Society for the Propagation etc. v. Pawlet, 4 Pet. 480; Baltimore etc. R. R. Co. v. Reaney, 42 Md. 131; Springfield v. Connecticut etc. R. R. Co., 4 Cush. 63; 1 Bishop's New Criminal Procedure, sec. 181.

A policeman, then, has the same power of making arrests for crimes or offenses against the state as has a sheriff, constable, etc., and in thus making arrests is covered by the same peculiar protection which the law throws around a sheriff or other like officer.

If a sheriff or other peace officer arrest a person without warrant, he will be justified in doing so although no felony be

actually committed; it is sufficient if he have reasonable cause either on his own knowledge of facts, or on facts communicated to him by others, to suspect the one apprehended. And in thus arresting such suspected felon, or in conveying him to the place of confinement, if the person arrested, or attempted to be arrested, in his endeavor to escape, kill the officer, the crime will <sup>111</sup> be murder; but if the officer necessarily kill him when he resists arrest, or endeavors to escape, the homicide will be altogether justifiable: *State v. Underwood*, 75 Mo. 230; 1 *Bishop's New Criminal Procedure*, sec. 181, and cases cited, and authorities *supra*. See, also, 2 *Am. & Eng. Ency. of Law*, 2d ed., 870. Here Bernard had given the police officers direct and positive information as to the felon and afterward at the time of the arrest, identified the felon. More than this certainly could not be required.

3. But it is objected that defendant had no notice of the official character of the officers. This is answered as to Henniske by the testimony aforesaid of the matron of the jail as to defendant's covert threats against Henniske, and by the official uniforms worn by both officers at the time of the arrest.

4. But further objection is made that defendant was not notified by the officers for what he was arrested. This, however, was not necessary, inasmuch as defendant was apprehended on fresh pursuit; for in such cases notice is not requisite, because the accused is presumed to know for what he is arrested: 1 *Wharton on Criminal Law*, 10th ed., sec. 418, and cases cited; *Lewis v. State*, 3 Head, 147; *Rex v. Howarth*, 1 *Moody C. C.* 207; *Rex v. Hunt*, 1 *Moody C. C.* 93. And it is the rule that notice of the charge and of intention to make the arrest may be made to appear by some incidental matter: *Gordon's Case*, 1 *East P. C.* 315. And it is agreed on all hands that a private person making an arrest for a past felony need not give notice of the ground for the arrest, if the accused have notice aliunde: *State v. Albright*, 144 Mo. 638, 46 S. W. 620. Here the pursuit was fresh, since not more than twenty or twenty-five minutes elapsed between pursuit begun and apprehension had.

5. But even could the arrest be regarded as one made by <sup>112</sup> mere private citizens, still Bernard had knowledge of the crime committed and of the one who committed it, and therefore the killing of him in making the arrest, or of one of his assistants, would also be murder: *State v. Albright*, 144 Mo. 638, 46 S. W. 620, and cases cited.



6. Under the authorities cited, even if there had been no felony committed, still, arresting defendant in the circumstances already related, the officers would have been justified in killing defendant, if necessary to overcome his resistance; that is, if he could not otherwise be taken or such resistance overcome; and the killing of Hennicke was nothing less than murder in the first degree; for in such circumstances "passion becomes wickedness and resistance crime." Under these views there was in this cause neither murder in the second degree nor manslaughter.

7. Holding as above, it is only necessary to say that the instructions given (except as to murder in the second degree) were substantially correct, and that those refused defendant were consequently correctly refused.

Therefore, judgment affirmed, and the sentence pronounced ordered to be executed.

All concur.

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## THE RIGHT OF POLICEMEN TO ARREST AND OF CITIZENS TO RESIST.\*

### I. What are Policemen.

### II. Right of Policemen to Arrest.

#### a. Under Warrant.

1. Regular Warrant.
2. Necessity of Possession of Warrant.

#### b. Without Warrant.

1. At Common Law.
2. Under Statute.
3. Arrest for Felony.
4. Suspicion of Felony.
5. Breach of Peace in Officer's Presence.
6. Breach of Peace not in Officer's Presence.
7. Misdemeanor in Officer's Presence.
8. Suspicion of Misdemeanor.
9. Arrest for Violating City Ordinances.
10. Arrest for Past Offenses.
11. Offenses Against Public Health or Morals.
12. Arrest of Night-walkers, Frowlers, and Suspicious Characters.

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\*REFERENCES TO MONOGRAPHIC NOTES.

Arrest of fugitives from justice: 46 Am. St. Rep. 415-417.

Arrest: 61 Am. Dec. 151-164.

13. Place Where Arrest may be Made.

14. Making Known Official Character.

15. Force, Policeman may Use.

### III. Right to Resist Arrest.

a. Under Warrant.

b. Without Warrant.

1. Lawful Arrest.

2. Resisting Arrest for Felony.

3. Resisting Arrest for Misdemeanor.

4. Innocence Gives no Right to Resist.

5. Force Used in Resisting.

6. Officer Making Known His Character.

#### I. What are Policemen.

"Policeman" was a term unknown to the common law. But, as said in the principal case, it is the legal equivalent of "watchman," and he "has the same power of making arrests for crimes or offenses against the state as has a sheriff, constable, etc., and, in thus making arrests is covered by the same peculiar protection which the law throws around a sheriff or other like officer." A policeman is the creature of statute, and has such powers as are conferred upon him by the legislature or by a municipal ordinance: *State v. Freeman*, 86 N. C. 683; *State v. Brown*, 5 Harr. 505; *Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100, 20 N. E. 644; *State v. Holcomb*, 86 Mo. 371; *State v. Bowen*, 17 S. C. 58. Where policemen are charged with duties which make them conservators of the peace, they have the same right to arrest as such officers at common law: *State v. Bowen*, 17 S. C. 58. "Where officers, even though unknown as such to the common law, are expressly authorized by statute, or by a municipal ordinance duly enacted, to conserve the peace, they have all the common-law authority of constables or peace officers, and may apprehend and take into custody those who violate the law of ordinances of a city in their presence without warrant": *Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100, 20 N. E. 644. The members of a police force of municipalities, we believe, are uniformly given the powers of constables at common law and under the statutes—that is, so far as their right to arrest for crimes is concerned: See *Carpenter v. Mills*, 29 How. Pr. 473; *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458; *State v. Freeman*, 86 N. C. 683; *Shanley v. Wells*, 71 Ill. 78; *Johnson v. State*, 30 Ga. 426; *State v. Carpenter*, 54 Vt. 551; *State v. Brown*, 5 Harr. 505.

Policemen, then, being uniformly given the powers of, and treated as, sheriffs and constables, as respects their right to make arrests, the cases which treat of the powers of these latter officers to arrest for offenses are applicable to policemen. Many of the authorities,

indeed most of them, involve the power of constables or marshals, and do not mention municipal police officers at all, but they are none the less in point on this account.

## II. Right of Policemen to Arrest.

### a. Under Warrant.

1. **Regular Warrant.**—A police officer has a right to make an arrest under a warrant regular and legal on its face: *People v. Warren*, 5 Hill, 440; *State v. Weed*, 21 N. H. 262, 53 Am. Dec. 188; *Underwood v. Robinson*, 106 Mass. 296. But he will not be protected if he makes an arrest under process void in all respects upon its face: *State v. Weed*, 21 N. H. 262, 53 Am. Dec. 188. If the process is regular on its face he is protected, although he may have had knowledge of facts which rendered it void for want of jurisdiction: *People v. Warren*, 5 Hill, 440. If an officer has a valid warrant in his possession there is no doubt of his power to arrest. The main questions concerning such power arise in cases where the officer acts without warrant, and for this reason this note will treat chiefly of such cases. Some of the questions involving the power of an arresting officer may arise under either situation, but will be noticed only in connection with arrests without warrant.

2. **Necessity of Possession of Warrant.**—It is required by statute in some states that the police officer should have the warrant in his possession at the time of making the arrest, so as to be able to show it to the accused if required: *People v. Shanley*, 40 Hun, 477. Where an arrest is required to be made under a warrant, the officer must have the warrant in his possession: *People v. Shanley*, 40 Hun, 477. We shall subsequently see in detail that in cases of ordinary misdemeanors an officer cannot arrest without a warrant unless he was present when the offense was committed. Hence, in cases of crimes of a less degree than felony, an officer should have the warrant in his possession in order to justify his act: *Webb v. State*, 51 N. J. L. 189, 17 Atl. 113; *People v. Shanley*, 40 Hun, 477; *Galliard v. Laxton*, 2 Best & S. 363; *Croom v. State*, 85 Ga. 718, 21 Am. St. Rep. 179, 11 S. E. 1035. Since an officer may arrest for a felony without a warrant, possession of a warrant by the officer in such a case is immaterial: *Drennan v. People*, 10 Mich. 169; *Croom v. State*, 85 Ga. 718, 21 Am. St. Rep. 179, 11 S. E. 1035. He may make the arrest, merely having knowledge of the felony charge against the prisoner and of an outstanding warrant: *State v. Symes*, 20 Wash. 484, 55 Pac. 626. An officer having a warrant in his possession should read it if requested: *State v. Garrett*, 1 Winst. 144, 84 Am. Dec. 359; *Commonwealth v. Hewes*, 1 Brewst. 348. But he is not bound to show it or read it if he is resisted. He may make the arrest and exhibit the warrant afterward: *Commonwealth v. Hewes*, 1 Brewst. 348; *State v. Gar-*



rett, 1 Winst. 144, 84 Am. Dec. 359; *Commonwealth v. Cooley*, 6 Gray, 350; *State v. Townsend*, 5 Harr. 487. If he is not known as an officer, he should make known his authority and show his warrant, unless prevented by the resistance of the offender: *Commonwealth v. Field*, 13 Mass. 321. And where the accused has notice of the process, and intends to resist it at all hazards, it is unnecessary to read it to him: *State v. Garrett*, 1 Winst. 144, 84 Am. Dec. 359

#### b. Without Warrant.

1. **At Common Law.**—A peace officer may, without a warrant, arrest for a felony or breach of the peace committed in his presence, or when he has reasonable grounds to believe that a felony has been committed, or in cases where a dangerous wound has been given whereby a felony is likely to result: *Shanley v. Wells*, 71 Ill. 78; *Wright v. Commonwealth*, 85 Ky. 123, 2 S. W. 904; *Wakely v. Hart*, 6 Binn. 316; and in cases of treason: *Ballard v. State*, 43 Ohio St. 340, 1 N. E. 76; *State v. Freeman*, 86 N. C. 683. An arrest without warrant was lawful only in cases where the public security required it, and it was firmly established that this necessity was only recognized in cases of felony and of breaches of the peace committed in the presence of an officer: *Way's Case*, 41 Mich. 299, 1 N. W. 1021.

2. **Under Statute.**—The right to arrest without warrant may be enlarged by statute, and has been in many, if not all, of the states. Thus, under the statutes of Ohio, a police officer is authorized to arrest any person found violating any law of the state or any municipal ordinance: *Ballard v. State*, 43 Ohio St. 340, 1 N. E. 76. In Minnesota a peace officer may arrest for any public offense committed in his presence: *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458. In Indiana, where town marshals were given the same power as constables, who could arrest for any violation of law in their presence, it was held that they could arrest without warrant for violating a city ordinance, whether the ordinance expressly authorized it or not: *Scirele v. Neeves*, 47 Ind. 289. Indeed, it may be very generally said that a police officer is given authority by statute to arrest without warrant for any public offense committed in his presence: See Cal. Pen. Code, sec. 836; *Commonwealth v. Coughlin*, 123 Mass. 436; *Bad Elk v. United States*, 177 U. S. 529, 20 Sup. Ct. Rep. 729. And this authority includes power to arrest for the violation of municipal ordinances; *Village of Oran v. Bles*, 52 Mo. App. 509; *Roderick v. Whitson*, 51 Hun, 620, 4 N. Y. Supp. 112; *State v. Freeman*, 86 N. C. 683. Statute may authorize arrest without warrant for any misdemeanor committed in the presence of an officer: *Stage Horse Cases*, 15 Abb. Pr., N. S., 51. The offense need not amount to a breach of the peace: *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458; *Burroughs v. Eastman*, 101 Mich. 419, 46 Am. St. Rep. 419, 59 N. W. 817. Such statutes authorizing arrest

for the commission of any public offense in the presence of the officer, or for the violation of a city ordinance, have generally been upheld as constitutional: See *Burroughs v. Eastman*, 101 Mich. 419, 45 Am. St. Rep. 419, 59 N. W. 817, where the question is fully discussed. In making arrests under such statutes, however, it has been held that the facts themselves must exist which give the officer power to act, and although the officer acts in good faith if in fact the offense is not being committed, he will be held liable since he had no authority to act: *Phillips v. Fadden*, 125 Mass. 198. It seems that by statute the police of the city of St. Louis and other Missouri cities are authorized to make arrests, regardless of the grade of the offense, if they merely have reasonable and probable cause to suspect that the one arrested has committed an offense. This goes much further than most of the statutes, since it authorizes arrests for minor offenses not committed in the presence of the officer: *State v. Hancock*, 73 Mo. App. 19; *State v. Grant*, 76 Mo. 236. But in Kansas, a statute which attempted to authorize the police of cities of the first class to arrest without warrant for misdemeanors not committed within the view of the officer, and merely upon suspicion, was held to be unconstitutional and void, as violating the right of the people to be secure in their persons against unreasonable seizures; *In re Kellam*, 55 Kan. 700, 41 Pac. 960. Quoting from *Pinkerton v. Verberg*, 78 Mich. 573, 18 Am. St. Rep. 473, 44 N. W. 579, the court says: "If persons can be restrained of their liberty and assaulted and imprisoned under such circumstances [i. e., when no offense is committed in the officer's presence, and merely on suspicion], without complaint or warrant, then there is no limit to the power of a police officer. . . . Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our constitution guarantees. These are rights which existed long before our constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land." So far, however, as concerns arrest for offenses in the presence of an officer which do not amount to a breach of the peace, there can be no doubt that statute may authorize an arrest for them without a warrant.

3. **Arrest for Felony.**—A police officer may, without a warrant, arrest for a felony committed in his presence, or for a felony which has in fact been committed, though not in his presence, if he has good reason to suspect that the arrested person is guilty. This was the rule at common law, and has not been changed by statute anywhere: *Marsh v. Smith*, 49 Ill. 396; *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669; *Rohan v. Sawin*, 5 Cush. 281; *McMahon v. People*, 189 Ill. 222, 59 N. E. 584; *Holley v. Mix*, 3 Wend. 353, 20 Am. Dec.

702. An arrest may be made for statutory felony the same as for a common-law felony. And when a statute punishes an offense by imprisonment in the state's prison, such offense, unless it is expressly declared to be a misdemeanor, is considered and treated as a felony, so far as regards the right of an officer to arrest without process: *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266, 38 N. W. 885. Maliciously injuring a dam being made a felony by statute, an officer may arrest for such an offense without a warrant: *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266, 38 N. W. 885. Petit larceny was a felony at common law, and if it is still a felony under the statute, an officer may arrest for it without a warrant: *Carpenter v. Mills*, 29 How. Pr. 473. But where the punishment for such an offense has been so changed that it is no more subject to the same penalties as felonies, the offense will not be classed as a felony, so as to give an officer a right to arrest without a warrant merely on suspicion: *Bright v. Patton*, 5 Mackey, 534, 60 Am. Rep. 396. Hence, one who has a few minutes before stolen coal of less value than a dollar cannot be arrested without a warrant: *Griffin v. San Antonio etc. Ry. Co.* (Tex. Civ. App.), 42 S. W. 319.

4. **Suspicion of Felony.**—Both at common law and under the statutes of the various states a police officer may arrest without a warrant one whom he suspects to be guilty of a felony, if he acts in good faith and has reasonable cause to suspect that the person arrested has committed a felony: *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811; *Eanes v. State*, 6 Humph. 53, 44 Am. Dec. 289; *Morris v. Kasling*, 79 Tex. 141, 15 S. W. 226; *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648, 39 Atl. 447; *Johnson v. State*, 30 Ga. 426; *Carr v. State*, 43 Ark. 99; *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *Karner v. Stump*, 12 Tex. Civ. App. 460, 34 S. W. 656; *Holley v. Mix*, 3 Wend. 350, 20 Am. Dec. 702; *People v. Wilson*, 55 Mich. 506, 21 N. W. 905; *Neal v. Joyner*, 89 N. C. 287; *Drennan v. People*, 10 Mich. 169; *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669; *Dodds v. Board*, 43 Ill. 95; *Rohan v. Sawin*, 5 Cush. 281.

A policeman has no authority to arrest on the mere belief that a party has been guilty of an offense, if such belief has no basis of fact or circumstance on which to rest: *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218. His suspicion must not be causeless, but his belief of guilt must be based on actual facts that create probable cause: *People v. Burt*, 51 Mich. 199, 16 N. W. 378.

An officer does not act on sufficient cause, when he arrests at the request of a third person who has a mere suspicion that the accused is guilty of a felony, but who is unable to produce any proof of the reasonable ground of such suspicion: *Karner v. Stump*, 12 Tex. Civ. App. 460, 34 S. W. 656. The official proclamation of the governor of the state that a felony has been committed, and offering a reward for the arrest of the felon is sufficient evidence of



the commission of a felony to justify an arrest of the supposed felon: *Eanes v. State*, 6 Humph. 53, 44 Am. Dec. 289. An officer may act upon information from another upon which he had reason to rely: *Holley v. Mix*, 3 Wend. 350, 20 Am. Dec. 702. And a person may be arrested who himself creates facts and circumstances sufficient to give an officer reasonable cause to suspect him of the commission of a felony: *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811.

An officer may arrest without warrant if he has reasonable ground to believe that a felony has been committed, and that the one arrested is guilty, although no offense was in fact committed: *Holley v. Mix*, 3 Wend. 350, 20 Am. Dec. 702; *Carr v. State*, 43 Ark. 99; *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811; *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669; *Neal v. Joyner*, 89 N. C. 287.

Petit larceny was a felony at common law, and where this rule has not been changed, an officer may arrest without warrant upon a reasonable suspicion that the one arrested has committed such offense: *Drennan v. People*, 10 Mich. 169; *People v. Wilson*, 55 Mich. 506, 21 N. W. 905. There is an apparent suggestion in some cases that an officer is permitted to arrest without warrant in such cases in order to prevent an escape, and the delay incident to procuring a warrant would enable the offender to escape: *Neal v. Joyner*, 89 N. C. 287. But there can be no doubt that an officer has authority to make the arrest, even though there is no reason to fear the escape of the offender: *Wade v. Chaffee*, 8 R. I. 224, 5 Am. Rep. 572.

**5. Breach of Peace in Officer's Presence.**—An officer may, without a warrant, arrest for a breach of the peace committed in his presence. This was the rule at common law, and has never been changed: *Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100, 20 N. E. 644; *Vandever v. Matlocks*, 3 Ind. 479; *State v. Guy*, 46 La. Ann. 1441, 16 South. 404; *Commonwealth v. Tobin*, 108 Mass. 426, 11 Am. Rep. 375; *Davis v. Burgess*, 54 Mich. 514, 52 Am. Rep. 828, 20 N. W. 540; *Lewis v. Kahn*, 15 Daly, 326; *Commonwealth v. Deacon*, 8 Serg. & R. 47; *Taaffe v. Slevin*, 11 Mo. App. 507; *Douglass v. Barber*, 18 R. I. 459, 28 Atl. 805; *State v. Russell*, 1 Houst. C. C. 622; *State v. Bowen*, 17 S. C. 58; *Beville v. State*, 16 Tex. App. 70; *In re Powers*, 25 Vt. 261; *State v. Dennis*, 2 Marv. (Del.) 433, 43 Atl. 261.

The offense must be a breach of the peace, however, to warrant an arrest at common law, for there may be minor offenses within view of the officer which do not amount to breaches of the peace, and for which no arrest could be made without a warrant, unless the right to arrest had been enlarged by statute. Such noise and disturbance as might create alarm and would disquiet the neighborhood is a breach of the peace: *Lewis v. Kahn*, 15 Daly, 326; *Howell v. Jackson*, 6 Car. & P. 723; *McIntyre v. Raduns*, 14 Jones & S. 123. The use of profane, indecent, and abusive language by

one toward another on the street and in the presence of others is a breach of the peace: *Davis v. Burgess*, 54 Mich. 514, 52 Am. Rep. 828, 20 N. W. 540. Any affray or assault is a disturbance of the peace: *Commonwealth v. Tobin*, 108 Mass. 426, 11 Am. Rep. 375; *Commonwealth v. Deacon*, 8 Serg. & R. 47; *United States v. Pignel*, 1 Cox C. C. 310. To willfully interrupt or disturb a school is a breach of the peace: *Douglass v. Barber*, 18 R. I. 459, 28 Atl. 805. One shouting and making a loud noise at a late hour at night may be arrested without a warrant for a breach of the peace: *State v. Russell*, 1 Houst. C. C. 122. Fraudulently changing a check at a restaurant so as to make a bill less than the correct amount is not such a breach of the peace as will authorize an arrest without a warrant: *Boyleston v. Kerr*, 2 Daly, 220. One may be arrested without a warrant for disturbing a lawful military parade, but it seems not if the parade is in violation of law: *White v. State*, 90 Ga. 16, 26 S. E. 742. Under an ordinance of the city of Chicago, arrests may be made for threatened breaches of the peace: *Main v. McCarty*, 15 Ill. 441. One may be arrested for a breach of the peace committed while attempting to exercise a right: *Taafe v. Kyne*, 9 Mo. App. 15. And if he resists public officers in making an improvement in front of and over his property, he may be arrested: *Crosland v. Shaw* (Pa.), 12 Atl. 849. The wanton discharge of a firearm in the public street of a city is a breach of the peace; *People v. Bartz*, 53 Mich. 493, 19 N. W. 161.

An officer can arrest for breach of the peace without a warrant only when the offense is committed in his presence. But an offense is considered within his view where his senses afford him knowledge that one is being committed. Hence, if it is committed in his hearing, and so near that he cannot be mistaken as to the offender, this is sufficient. It is therefore held that an officer who is attracted by the outcry of a woman may arrest for wife beating if he arrives during the progress of or immediately after the beating: *Ramsey v. State*, 92 Ga. 53, 17 S. E. 613; *Dilger v. Commonwealth*, 88 Ky. 550, 11 S. W. 651. A breach of the peace committed at night in the dark and some distance from the officer is yet in his presence, if he can detect the act and could see the person if it were light: *People v. Bartz*, 53 Mich. 493, 19 N. W. 161. And where the officer could hear a blow given and the resulting outcry, the offense is in his presence, though, on account of darkness, he could not see the assault: *State v. McAfee*, 107 N. C. 812, 12 S. E. 435. A larceny is in an officer's presence, though the offender is five hundred yards from the place where the goods were taken, so long as the original taking is still unbroken, and the original carrying away is yet in progress: *State v. Grant*, 76 Mo. 236. One arrested for disorderly conduct who is released on his promise to go directly home, may be retaken on his going into a bar-room before he is out of the officer's sight: *Commonwealth v. Hastings*, 9 Met. 259.

An arrest for an offense less than a felony should be made at the time or within a reasonable time thereafter: *Wahl v. Walton*, 30 Minn. 506, 16 N. W. 397; *Taylor v. Strong*, 3 Wend. 385. And what is a reasonable time, if the facts are undisputed, is a question for the court to determine: *Butolph v. Blust*, 5 Lans. 84. In this last case a delay of half an hour in order to procure the help of an officer was deemed to be reasonable. In *Regina v. Walker*, 25 Eng. Law & Eq. 589, a delay of two hours was held to be unreasonable and to make the arrest unlawful. A delay of five hours, during which the officer was doing nothing connected with the arrest, was held to put an end to the officer's authority to act without a warrant: *Wahl v. Walton*, 30 Minn. 506, 16 N. W. 397. But an arrest need not be made immediately while the breach of peace is going on; it may be made after peace is restored and the affray is over: *Main v. McCarty*, 15 Ill. 441.

An actual breach of the peace is not necessary to justify an arrest. An officer may act on appearances and make an arrest to prevent a breach of the peace: *Hayes v. Mitchell*, 80 Ala. 183. A mere threat to do some harm to the arresting officer some time in the future will not warrant an arrest: *Giroux v. State*, 40 Tex. 98. In order that threats shall justify an arrest without a warrant, the facts must be such as to warrant the officer in believing that the arrest is necessary to prevent their immediate execution, as where the threat is coupled with some overt act: *Quinn v. Heisel*, 40 Mich. 576.

**6. Breach of Peace not in Officer's Presence.**—As already indicated by the authorities cited, an officer can arrest for a breach of the peace only when it is committed in his presence. This was the common-law rule, and it is the rule very generally under the statutes of the various states: *State v. Lewis*, 50 Ohio St. 179, 33 N. E. 405; *People v. Haley*, 48 Mich. 495, 12 N. W. 671; *Boyleston v. Kerr*, 2 Daly, 220; *Sternack v. Brooks*, 7 Daly, 142; *Winn v. Hobson*, 22 Jones & S. 330; *State v. Crocker*, 1 Houst. C. C. 434. An officer who was in one street and heard shouting in another street at night, but who was not where he could see or tell who did it, has no authority to arrest upon information received from a third person: *People v. Johnson*, 86 Mich. 175, 24 Am. St. Rep. 116, 48 N. W. 870. But if he is so near that he cannot be mistaken as to the offender he may arrest: *Dilger v. Commonwealth*, 88 Ky. 550, 11 S. W. 651. Hence, if from the outside of a house he can hear a disturbance or disorderly conduct within, he may enter the house and arrest the person guilty thereof: *Hawkins v. Lutton*, 95 Wis. 492, 60 Am. St. Rep. 131, 70 N. W. 483. And an officer may enter a private house to arrest one who is drunk and committing a breach of the peace therein: *Ford v. Breen*, 173 Mass. 52, 53 N. E. 136. An officer cannot make an arrest for a breach of the peace on the mere statement of one on whom an assault has been committed, or



on the faith of some rumor to which the officer might give credence: *Jamison v. Gaernett*, 10 Bush, 221. In *Baltimore etc. R. R. Co. v. Cain*, 81 Md. 87, 31 Atl. 801, where the conductor of a train telegraphed ahead for an officer who arrested one who had been committing breaches of the peace on the train, the arrest was held to be valid, though the offense was not in the presence of the officer, the court viewing it as an arrest by the conductor for an actual breach of the peace in his presence, and a mere delivery of the offender to the police officer afterward. A breach of the peace is a misdemeanor, and the rules of arrest relative to misdemeanors, which are subsequently noticed, will be found applicable to breaches of the peace in so far as the misdemeanor amounts to a breach of the peace.

**7. Misdemeanor in Officer's Presence.**—An officer cannot, without a warrant, arrest for a misdemeanor unless it was committed in his presence: *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. Rep. 608, 28 N. W. 695; *Bright v. Patton*, 5 Mackey, 534, 60 Am. Rep. 396; *Pinkerton v. Verberg*, 78 Mich. 573, 18 Am. St. Rep. 473, 44 N. W. 579.

After a misdemeanor has been committed, an officer has no right to arrest the offender without a warrant: *Bright v. Patton*, 5 Mackey, 534, 60 Am. Rep. 396. This was the common-law rule: *State v. Davidson*, 44 Mo. App. 513. An officer cannot arrest unless he actually sees the offense which constitutes the misdemeanor: *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. Rep. 608, 28 N. W. 695; *Stittgen v. Rundle*, 99 Wis. 78, 74 N. W. 536. Of course, if an officer is present when the misdemeanor is being committed he may arrest: *State v. McNally*, 87 Mo. 644.

At common law, it seems that the right to arrest, without warrant, for misdemeanors committed in the presence of an officer was confined to such misdemeanors as amounted to a breach of the peace: *Butolph v. Blust*, 5 Lans. 84; *Stage Horse Cases*, 15 Abb. Pr., N. S., 51; *Boyleston v. Kerr*, 2 Daly, 220; *Danovan v. Jones*, 36 N. H. 246; *San Antonio etc. Ry. Co. v. Griffin*, 20 Tex. Civ. App. 91, 48 S. W. 542. And there is no authority to arrest without a warrant for statutory misdemeanors not amounting to a breach of the peace, unless it is given by statute: *Commonwealth v. Wright*, 158 Mass. 149, 35 Am. St. Rep. 475, 33 N. E. 82. There are, no doubt, cases which indicate that at common law a peace officer could, without a warrant, arrest for any misdemeanor committed in his presence. The question is of but slight importance, however, since the legislature may provide, and has done so perhaps in most of the states, that arrests shall be made for all misdemeanors committed in an officer's presence: See *Butolph v. Blust*, 5 Lans. 84; *Danovan v. Jones*, 36 N. H. 246; *Wood v. Brooklyn*, 14 Barb. 425; *State v. Lewis*, 50 Ohio St. 179, 33 N. E. 405; *Stage Horse Cases*, 15 Abb. Pr., N. S., 51. And such acts are constitu-

tional: *Burroughs v. Eastman*, 101 Mich. 419, 45 Am. St. Rep. 419, 59 N. W. 817.

Cruelty to animals is a misdemeanor for which an officer may arrest without a warrant: *Stage Horse Cases*, 15 Abb. Pr., N. S., 51; *Butolph v. Blust*, 5 Lans. 84; *Corbett v. Sullivan*, 54 Vt. 619. One who resists the execution of a lawful search-warrant may be summarily arrested: *Leddy v. Crossman*, 108 Mass. 237. An officer may arrest without a warrant one who is illegally carrying deadly weapons: *Hodges v. State*, 6 Tex. App. 615. But it seems that where no statute or ordinance confers power on policemen to arrest without a warrant for carrying concealed weapons, no such right exists, as the offense does not amount to a breach of the peace in their presence: *State v. Holcomb*, 86 Mo. 371. Breaking into a ticket office in the daytime with intent to steal being a misdemeanor, an arrest for such offense not committed in the officers' presence cannot be made without a warrant: *Commonwealth v. Carey*, 12 Cush. 246. By virtue of statute one may be arrested without warrant for unnecessary traveling on Sunday: *Mayo v. Wilson*, 1 N. H. 53. One may be arrested for giving a bottle of beer to another on election day, in violation of the statute: *Weser v. Welty*, 18 Ind. App. 664, 47 N. E. 639. A police officer may arrest for vagrancy without a warrant: *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97. But all the facts essential to constitute one a vagrant should be present in order to authorize such an arrest: *Shanley v. Wells*, 71 Ill. 78. And in *Way's Case*, 41 Mich. 299, 1 N. W. 1021, it was said that the occasion which would justify an arrest without process would be very rare in cases of vagrancy. A vagrant who has been released on condition that he leave town within a certain time cannot be rearrested simply because of his failure to keep his promise: *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97. An officer cannot arrest a passenger for refusal to pay fare, merely on the statement of the conductor, where the offense was not committed in the officer's presence: *Krulevitz v. Eastern R. R. Co.*, 143 Mass. 228, 9 N. E. 613. Neither can one be arrested for fraudulently evading the payment of fare to a conductor, the arresting officer not being present: *Palmer v. Maine Cent. R. R. Co.*, 92 Me. 399, 69 Am. St. Rep. 513, 42 Atl. 800.

8. Suspicion of Misdemeanor.—As already seen, an officer has no authority to arrest for a misdemeanor not committed in his presence, upon mere suspicion that the arrested person is guilty, or at the request of another: *Taafe v. Slevin*, 11 Mo. App. 507; *State v. Davidson*, 44 Mo. App. 513; *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218. An arrest cannot be made for a crime proved or suspected, unless it amounted to a felony: *Commonwealth v. Carey*, 12 Cush. 246; *Commonwealth v. McLaughlin*, 12 Cush. 615. A dictum in *State v. Brown*, 5 Harr. 505, states that a peace officer may arrest without warrant one whom he has reasonable ground

to believe has committed any crime. But this is clearly not the law. In *Mason v. Lathrop*, 7 Gray, 354, it was held, applying the general rule, that an officer could not arrest one for illegally transporting liquors, even though he acted in good faith and had reasonable cause to suspect that the person was guilty. The statute provided that such an arrest could be made if the officer had reasonable proof that the person was guilty. And in *Kennedy v. Favor*, 14 Gray, 200, it was held that reasonable proof was something more than mere probable cause to believe, or suspicion. Statute may authorize an arrest for carrying concealed weapons, upon information of a credible person and without warrant: *Ex parte Sherwood*, 29 Tex. App. 334, 15 S. W. 812; *Jacobs v. State* (Tex. App.), 12 S. W. 408. In such a case it is said that the accused was found violating a law of the state, in the act of committing the offense, and the act was held as not authorizing an arrest without warrant "on a mere venture, without knowledge or reliable information": *Ballard v. State*, 43 Ohio St. 340, 1 N. E. 76. Authority has been given by statute in some states to make an arrest, regardless of the grade of the offense, when the police officer has reasonable and probable cause to suspect the person guilty of an offense: *State v. Hancock*, 73 Mo. App. 19; *State v. Grant*, 76 Mo. 236. The constitutionality of such legislation has, however, been seriously questioned. In *Stittgen v. Rundle*, 99 Wis. 78, 74 N. W. 536, it was held that a city ordinance could not confer such authority on policemen. And in *In re Kellam*, 55 Kan. 700, 41 Pac. 960, a general statute, which attempted to authorize arrests without a warrant for misdemeanors not committed in the view of the officer, and merely upon suspicion, was held to be unconstitutional and void. Such legislation was here said to be, "in effect, a revival of the odious general warrants, which placed the liberty of every man in the hands of every petty officer, and which long ago received judicial condemnation."

**9. Arrest for Violating City Ordinances.**—Policemen are either by statute or by ordinance given power to arrest without warrant any person who in their presence violates a city ordinance. Probably such authority is universally conferred upon the police of a city: *White v. Kent*, 11 Ohio St. 550; *State v. Freeman*, 86 N. C. 683; *Roderick v. Whitson*, 51 Hun, 620, 4 N. Y. Supp. 112; *Village of Oran v. Bles*, 52 Mo. App. 509; *Montgomery v. Sutton*, 67 Iowa, 497, 25 N. W. 748; *State v. Lewis*, 50 Ohio St. 179, 33 N. E. 405; *Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100, 20 N. E. 644; *State v. Bowen*, 17 S. C. 58; *Commonwealth v. Hastings*, 9 Met. 259.

But an officer cannot arrest without a warrant for the violation of a municipal ordinance, unless the offense was committed in his presence: *Pesterfield v. Vickers*, 3 Cold. 205; *State v. Lewis*, 50 Ohio St. 179, 33 N. E. 405. The rule is the same here as it is in the



case of misdemeanors generally. There is some intimation that the statutes of some of the states have so changed the rule that an arrest may be made though the offense was not committed in the officer's presence: See *Montgomery v. Sutton*, 67 Iowa, 497, 25 N. W. 748, where the offense was, however, committed in the officer's presence, and *State v. Hancock*, 73 Mo. App. 19; *State v. Grant*, 76 Mo. 236, where it seems the Missouri statutes have authorized arrests of this character. But see *In re Kellam*, 55 Kan. 700, 41 Pac. 960, holding that an act giving authority to arrest for misdemeanors not committed in the officer's presence and merely on suspicion was unconstitutional.

A police officer may arrest for the violation of a city ordinance which amounts to a breach of the peace: *State v. Bowen*, 17 S. C. 58; *Commonwealth v. Hastings*, 9 Met. 259; *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458; *State v. Belk*, 76 N. C. 10; *State v. Freeman*, 86 N. C. 683; *State v. Lafferty*, 5 Harr. 491; *Bryan v. Bates*, 15 Ill. 87; *Main v. McCarty*, 15 Ill. 441; *Jamison v. Gaernett*, 10 Bush, 221. No doubt, police officers may be authorized to arrest one for the violation of any city ordinance in his presence, whether the offense amounts to a breach of the peace or not: *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458. Authority is very generally granted to arrest without warrant for the violation of any city ordinance in the presence of an officer: *Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100, 20 N. E. 644. An arrest may be made for the breach of an ordinance made for the preservation of good order and public convenience: *White v. Kent*, 11 Ohio St. 550. An arrest may be made whether the ordinance especially authorizes it or not: *Scircle v. Neeves*, 47 Ind. 289. The violation of every town or city ordinance, even in the presence of an officer, does not necessarily give him the right to arrest the offender: *State v. Belk*, 76 N. C. 10. Thus, in *Tillman v. Beard*, 121 Mich. 475, 80 N. W. 248, where a person was selling popcorn and peanuts without having obtained a license as required by a village ordinance, it was held that an arrest could not be made without a warrant, for there was nothing in the act dangerous to the public, or liable to cause disturbance upon the streets, or even interfere with the public convenience. A similar rule was announced in *Pittston v. Dimond*, 7 Kulp, 431, where the peddling of fruit in violation of a city ordinance was held not to justify an arrest without a warrant. Proceedings for the recovery of penalties for the violation of city ordinances of this character cannot be commenced by summary arrest without process: *Clark v. New Brunswick*, 43 N. J. L. 175. In *Missouri etc. Ry. Co. v. Warner*, 19 Tex. Civ. App. 463, 49 S. W. 254, an arrest without a warrant, for selling, in an officer's presence, a railroad ticket in violation of a city ordinance prohibiting others than the owner from selling railroad tickets, was held to be unlawful, since the offense was not a violation of the public peace. So that in

some of the states this distinction is still maintained, that an officer cannot arrest without a warrant for the violation of a city ordinance which does not amount to a breach of the peace. A city ordinance may authorize the arrest, without a warrant, of a person who is a vagrant. But all the elements of vagrancy must exist: *Shanley v. Wells*, 71 Ill. 78. And a statutory definition of vagrancy, which includes only such cases of vagabondage as are known at common law, cannot be enlarged by municipal ordinance: *Way's Case*, 41 Mich. 299, 1 N. W. 1021.

10. **Arrest for Past Offenses.**—An officer may arrest without a warrant for a past felony: *State v. Brown*, 5 Harr. 505; *Eanes v. State*, 6 Humph. 53, 44 Am. Dec. 289; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97; *Commonwealth v. Deacon*, 8 Serg. & R. 47. But, as we have already seen, the officer must have reasonable grounds for suspecting that the one arrested is guilty of felony: *Eanes v. State*, 6 Humph. 53, 44 Am. Dec. 289, and numerous cases already cited. An officer cannot arrest for a past misdemeanor, not committed in his presence: *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669; *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. Rep. 608, 28 N. W. 695; *Pinkerton v. Verberg*, 78 Mich. 573, 18 Am. St. Rep. 473, 44 N. W. 579; *Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. Rep. 148; *Webb v. State*, 51 N. J. L. 189, 17 Atl. 113; *Meyer v. Clark*, 9 Jones & S. 107. Usually the arrest for a misdemeanor must be made immediately, or within a reasonable time after the offense is committed, and an unreasonable delay will render the arrest unlawful: See *Meyer v. Clark*, 9 Jones & S. 107; *Taylor v. Strong*, 3 Wend. 385; *Wahl v. Walton*, 30 Minn. 506, 16 N. W. 397. In *State v. Sims*, 16 S. C. 486, where the arrested persons were guilty of riotous conduct, although not in the immediate presence of the officers, it was held that they might be arrested without warrant, when the officers arrived soon after the occurrence of the riot. The officers were said to have authority under the special circumstances of this case, though the court recognized that, as a general rule, no authority exists to arrest for offenses less than felony when not committed in an officer's presence. An arrest may be made without warrant for a misdemeanor, such as a dangerous criminal assault, whereby a felony is likely to ensue: *Shanley v. Wells*, 71 Ill. 78. It seems that authority has been conferred upon the police officers of certain cities in Missouri to arrest without a warrant for past misdemeanors, where the officer has grounds of reasonable suspicion such as at common law would justify him in arresting for a past felony: *State v. Hancock*, 73 Mo. App. 19; *State v. Grant*, 76 Mo. 236. But in *Stittgen v. Rundle*, 99 Wis. 78, 74 N. W. 536, it was held that a city ordinance could not confer such authority, and in *In re Kellam*, 55 Kan. 700, 41 Pac. 960, a general statute was deemed unconstitutional which attempted to confer a similar power on police officers.

**11. Offenses Against Public Health or Morals.**—An officer may arrest a scavenger who is caught in the act of depositing night soil at a certain place in violation of the regulations of the board of health: *Mitchell v. Lemon*, 34 Md. 176. Although the placing of a post in a public street is a nuisance, an officer cannot arrest for it, since it is not a nuisance specified in the police law: *Danovan v. Jones*, 36 N. H. 246. And the tearing down a bridge under a contract to repair it, though the contract may be void, will not justify an arrest on the ground of creating a nuisance by obstructing the street: *Moore v. Durgin*, 68 Me. 148. Drunkenness is such a public nuisance that an officer may arrest one therefor without a warrant, if committed in his presence: *State v. Freeman*, 86 N. C. 683. Drunkenness is usually made an offense by statute or city ordinance, and it is generally recognized as an offense for which an officer may arrest without a warrant: *Beville v. State*, 16 Tex. App. 70; *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218. One may be drunk in a public place so as to authorize an arrest without a warrant, and yet not be subject to conviction for drunkenness under a statute which defines the offense as being drunk by the voluntary use of intoxicating liquor: *Commonwealth v. Coughlin*, 123 Mass. 436. It was held that there could be no question of the power to arrest for drunkenness without a warrant, in *Scircle v. Neeves*, 47 Ind. 289, where the court said: "There is probably not a city or town in the state, making any pretense to proper municipal government, that has not an ordinance in substance the same as this, and whose police officers do not constantly arrest, lock up, and afterward carry before the courts persons who violate its provisions. Such persons must learn that society has the right to protect itself against the evil influences of their example, and that they are proper subjects of municipal legislation, arrest, and punishment." It is not necessary that the person drunk should be in a public place. He may be publicly drunk in a private place, and yet be subject to arrest without a warrant: *State v. McNinch*, 87 N. C. 567. An officer who arrests one without a warrant for drunkenness is not liable criminally for an assault, if he had reasonable cause to believe such person to be intoxicated, although he was not in fact intoxicated: *Commonwealth v. Presby*, 14 Gray, 65; *Commonwealth v. Cheney*, 141 Mass. 102, 55 Am. Rep. 448, 6 N. E. 724. It is likely, however, that if the arrested person were not drunk in fact, that the officer would be liable to him in a civil action for damages: *Commonwealth v. Presby*, 14 Gray, 65; *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218. One who has been intoxicated earlier in the day may not be arrested if he is sober at the time of the arrest: *Newton v. Locklin*, 77 Ill. 103.

An officer may arrest persons for gambling in violation of law, where he finds them engaged in such act; *Willis v. Warren*, 1 Hilt. 590; *Shovlin v. Commonwealth*, 106 Pa. St. 369. An officer may



arrest without a warrant one who is buying votes in his presence at an election: *Curran v. Taylor*, 92 Ky. 537, 18 S. W. 232. Conspiring to produce an abortion not being a felony, an officer cannot, without a warrant, arrest for such an offense after its commission: *Scott v. Eldridge*, 154 Mass. 25, 27 N. E. 677. An officer cannot make an arrest for past adultery without a warrant: *Filer v. Smith*, 96 Mich. 347, 35 Am. St. Rep. 603, 55 N. W. 999. An officer may arrest for indecent exposure committed in his presence, whether the public exhibition is of an obscene picture or of the person's naked body: *State v. Freeman*, 86 N. C. 683; *Willis v. Warren*, 1 Hilt. 590.

An officer cannot arrest, without warrant, a street-walker or common prostitute who is on the street, upon a mere suspicion that she is plying her vocation, where there is no act indicating that she is there for that purpose: *Pinkerton v. Verberg*, 78 Mich. 573, 18 Am. St. Rep. 473, 44 N. W. 579. In this case the woman had been guilty of no disorderly conduct, or breach of the peace, and yet the trial court charged the jury in effect that a woman may, simply upon suspicion that she may commit an act which at most would only amount to a misdemeanor, be assaulted and imprisoned, if the officer has good reason to believe, and does believe, that she is plying her vocation in such a manner that it will result in an offense. In commenting on this the supreme court said: "No more dangerous doctrine could be laid down. It is a doctrine which, if upheld, would place even the most respectable lady in the land under the surveillance of policemen, and give them authority to arrest and imprison upon mere suspicion of an offense, however insignificant; and if carried to the extent contained in the charge of the circuit judge, it would not matter how undeserved the bad character or reputation of such person might be. If idle gossip is once set afloat reflecting upon the character and reputation of the most virtuous woman, and that gossip once comes to the ears of the police officer, he may act upon it, and be led to believe that the woman is upon the street intending to ply her vocation as a street-walker or common prostitute, and at once, without the formality of complaint or warrant, place her under arrest, and convey her to jail. The law has more regard for the liberty of the citizen, and there is a more decent and orderly manner of enforcing the law for the public good. The officer had no right to arrest the plaintiff, without warrant, upon mere suspicion that she was upon the street for the purpose of plying her vocation as a common prostitute. Our statute gives no such right, and at the common law no such right existed." A woman cannot be arrested as a common prostitute, on the ground that she is a disorderly person, unless the offense was committed in the officer's presence: *People v. Pratt*, 22 Hun, 300. An officer cannot arrest a woman whom he suspects to be a woman of ill-fame, between 10

and 11 o'clock at night, merely for coming up to him and calling him cousin: *People v. Bush*, 1 Wheel. C. C. 137. But a woman who sits at the window of her room and solicits men from the street for immoral purposes is a disorderly person, and may be arrested by an officer without a warrant if the offense is committed in his presence: *Harft v. McDonald*, 1 City Ct. Rep. 181.

**12. Arrest of Night-walkers, Prowlers, and Suspicious Characters.**—At common law peace officers had authority to arrest persons walking the streets at night when there is reasonable ground to suspect felony, although there is no proof that a felony has been committed: *Miles v. Weston*, 60 Ill. 361; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97. "The reason why night-walking and lurking about the premises of peaceable inhabitants in the night-time is disorderly conduct," said the court in *Miles v. Weston*, 60 Ill. 361, "is because such conduct cannot, in general, be for any but a bad purpose, and it tends to the annoyance and discomfort of peaceable citizens, who have a just right to be exempt from such disturbance. . . . The right of arrest in such cases, by the proper officer, is supported by the same reasons and necessity, to-day, that it was in the earlier history of the common law, and its existence we maintain without hesitation."

**13. Place Where Arrest May be Made.**—In cases of felony at least, a police officer may arrest without a warrant outside the city of which he is an officer: *Butolph v. Blust*, 5 Lans. 84. In *Williams v. State*, 44 Ala. 41, the authority of a policeman to make an arrest was held not to be confined to the town or city for which he was appointed, but was coextensive with the limits of the county. A police officer may upon a warrant arrest outside of the city: *Phillips v. State*, 66 Ga. 755. In *Commonwealth v. Martin*, 98 Mass. 4, it was held that an officer of a particular town could apprehend a person anywhere within the commonwealth upon a warrant for an offense committed within that town. But in the absence of statute conferring such power, it is probable that a police officer has no authority to arrest in cases of misdemeanor outside of the town for which he is appointed. In *Butolph v. Blust*, 5 Lans. 84, it was held that an officer could not pursue an offender into another jurisdiction, and there arrest him for a misdemeanor committed in his presence.

In cases of felony, where an officer has a reasonable suspicion that a felony has been committed and that the felon is in a certain building, he may, after demand, break open the doors for the purpose of entering and making the arrest, though he has no warrant: *Shanley v. Wells*, 71 Ill. 78. An officer may, without a warrant, enter a dwelling-house in the night-time, for the purpose of making an arrest to prevent a felony or breach of the peace, provided the conduct of the arrested party was such at the time as to justify the belief that the perpetration of a felony or breach of the peace

was intended: *State v. Stonderman*, 6 La. Ann. 286. Under a statute authorizing the arrest of a person found in "any place" in a state of intoxication committing a breach of the peace, an arrest may be made without warrant of one who in his own dwelling-house is intoxicated and committing a breach of the peace: *Ford v. Breen*, 173 Mass. 52, 53 N. E. 136. An officer may, without a warrant, enter a disorderly house to arrest one for creating a disturbance: *State v. Lafferty*, 5 Harr. 491. But a policeman has no right to rouse up the family of a respectable citizen in the night, and force himself into the house, upon the mere statement to him of a person that he has heard that a woman of bad character is stopping at the house: *Bailey v. Ragatz*, 50 Wis. 554, 36 Am. Rep. 862, 7 N. W. 564.

**14. Making Known Official Character.**—It is not every case that an officer is required to make known his official character, or the cause of the arrest, before making an arrest. We have seen under arrest with a warrant that an officer need not show his authority for the arrest, where he is immediately resisted and there is no opportunity for doing so. The same rule seems to hold good where an arrest is made without warrant: *Lewis v. State*, 3 Head. 127. Generally speaking, the officer should announce his official position at the time he makes the arrest: *Shovlin v. Commonwealth*, 106 Pa. St. 369. If demand is made on him as to his authority he should disclose it: *State v. Phinney*, 42 Me. 384. Where the officer is known, he need not disclose his official character, and if the party is caught in the act or upon fresh pursuit the cause of his arrest need not be made known: *Wolf v. State*, 19 Ohio St. 248; *State v. McAfee*, 107 N. C. 812, 12 S. E. 435; *State v. Townsend*, 5 Harr. 487; *People v. Pool*, 27 Cal. 573; *State v. Mowry*, 37 Kan. 369, 15 Pac. 282; *Lewis v. State*, 3 Head. 127.

**15. Force a Policeman May Use.**—If an officer has a right to make an arrest, he may use whatever force is reasonably necessary to prevent escape and secure the offender. "But the peace officer must use no more force and violence than is necessary to secure the arrest [of a person], and to convey him to a place of custody and safety for the purpose of his hearing; and if he uses more violence than is reasonably necessary, then he acts in an unlawful manner, and he might be held liable to the person injured in a civil action for damages, . . . or to indictment for assault and battery": *State v. Dennis*, 2 Marv. (Del.) 433, 43 Atl. 261; and see *Fulton v. Staats*, 41 N. Y. 498. If the offender resists arrest, the officer may use such force as is reasonably necessary to overcome the resistance. But he cannot use violence when no resistance is offered, or excessive violence when it is offered, and if he does so he cannot excuse himself on the ground of a lawful right to make the arrest: *State v. Hancock*, 73 Mo. App. 19.



In arresting for felony an officer may use such force as is necessary to capture the felon, even to killing him when in flight: *Dilger v. Commonwealth*, 88 Ky. 550, 11 S. W. 651; *Brooks v. Commonwealth*, 61 Pa. St. 352, 100 Am. Dec. 645; *State v. Rutherford*, 1 Hawks, 457, 9 Am. Dec. 658. A felon who resists or flees so that he cannot possibly be apprehended alive, may be slain in the effort to arrest him: *Carr v. State*, 43 Ark. 99. The rule is different in cases of misdemeanor. The officer cannot kill a misdemeanant who is fleeing. But if he resists to such an extent as to place the officer in danger of losing his life or of great bodily harm, the officer may kill him or inflict great bodily harm upon him. He may use sufficient force to overcome resistance, even to the taking of life if that becomes necessary: *Dilger v. Commonwealth*, 88 Ky. 550, 11 S. W. 651. If a misdemeanant resists arrest with violence, and in the struggle he is killed, the homicide is justifiable: *Clements v. State*, 50 Ala. 117. In order to justify the taking of life in making an arrest for a misdemeanor, there should be some element of self-defense, and the officer should be compelled to use such force only to save his own life or person from great bodily harm: *State v. McNally*, 87 Mo. 644, two of the justices dissenting, holding that an officer is authorized to employ the same force, and to resort when necessary to the same extreme measure in overcoming resistance to an arrest for misdemeanor as in cases of felony. An officer may use firearms for the purpose of frightening and intimidating a misdemeanant who is fleeing, so as to induce him to stop and surrender: *Mesmer v. Commonwealth*, 26 Gratt. 976.

### III. Right to Resist Arrest.

#### a. Under Warrant.

It has been said that a person is under no legal duty to submit to an arrest where the warrant is void upon its face, but may make lawful resistance: *Noles v. State*, 24 Ala. 672; *Howard v. State*, 121 Ala. 21, 25 South. 1000; *State v. Wimbush*, 9 S. C. 309. This doctrine, however, is not unqualifiedly true. No doubt in cases of breaches of the peace or other past misdemeanors, where no arrest may be made without a warrant, there must be a valid process in the officer's possession, and if the warrant is void on its face, the supposed offender may resist arrest. But we have already seen that there are cases where an officer may arrest for a past offense without a warrant. Thus, he may arrest for a past felony upon suspicion and having reasonable grounds to believe that the one arrested is guilty. Having no need of a warrant to protect him in such a case, therefore, the mere fact that the warrant was void would not of itself justify a person in making resistance: See *State v. Symes*, 20 Wash. 484, 55 Pac. 626. An officer is protected in making an arrest under a process regular upon its face: See the cases cited under "Right to Arrest Under a Warrant." The officer being

protected, the one arrested has no right to resist: *Kernan v. State*, 11 Ind. 471.

b. Without Warrant.

1. **Lawful Arrest.**—A person has no right to resist a lawful arrest. It is the duty of a citizen to submit to such an arrest: *Tiner v. State*, 44 Tex. 128; *State v. Anderson*, 1 Hill (S. C.), 327. 345. There is this limitation on the right to make a lawful arrest either with or without a warrant, and that is that if the lawful power to arrest is exercised in such a wanton and unlawful manner as to make the officer a trespasser, resistance will be justified: *State v. Oliver*, 2 Houst. 605. If the officer has a right to make an arrest, the one arrested has no right to resist. And conversely, if an officer unlawfully attempts to arrest a person, such person may lawfully resist the officer. "Whatever I may lawfully enjoy," said the court in *State v. Hooker*, 17 Vt. 658, "I may lawfully defend. In the protection of my own rights, whatever it is unlawful for another to do, it is lawful for me to prevent him from doing."

2. **Resisting Arrest for Felony.**—It has already been seen that an officer can arrest upon suspicion of felony if he has good grounds for believing that the one arrested is the offender, and that to justify the arrest he is not required to show that the arrested person has committed the offense. He may be innocent of any crime, and yet if the circumstances were such as to give the officer reasonable and probable cause that the person had committed a felony, he had a right to make the arrest. The officer, then, having a right to arrest, the citizen has no right to resist but should submit, however innocent he may be in fact. If the felony has been committed in his presence, or if he has reasonable grounds for believing that the person arrested has committed a felony, an officer may arrest. But if either of these situations does not exist, an officer has no authority to make an arrest, and a person whom he attempts to arrest, when none of these conditions exist, may resist: *Hughes v. Commonwealth*, 19 Ky. Law Rep. 497, 41 S. W. 294; *State v. Taylor*, 70 Vt. 1, 67 Am. St. Rep. 648, 39 Atl. 447; *Bad Elk v. United States*, 177 U. S. 529, 20 Sup. Ct. Rep. 729. From *State v. Russell* (Iowa), 76 N. W. 653, it might appear that a citizen under no circumstances had the right to resist arrest by an officer if he knows him to be such. But this extreme doctrine certainly cannot be sound, and its statement was unnecessary under the facts of this case. The officer there having a warrant, the arrest would have been lawful, and the citizen in resisting undoubtedly acted at his peril. And it is only a lawful arrest which cannot be resisted, but an unlawful one may always be. The chief difficulty, so far as the citizen is concerned, lies in the necessity for him to determine whether the arrest is lawful or not. He may be perfectly innocent of the alleged crime—indeed, it may be that no felony has been committed—and yet the

officer might be acting upon such reasonable grounds and such reliable information that the arrest itself would be justified, and hence no resistance could rightfully be made. It is certainly going too far to say that in all cases of an attempted arrest without a warrant for a felony the citizen has no right to resist, but in the absence on his part of knowledge of the grounds which the officer has for believing him guilty, it is safe not to resist until he knows whether the officer is attempting to make a groundless arrest.

It might be that a citizen did not know that he was resisting an officer, but supposed that he was defending himself against the unlawful assault of a private citizen. In such a case it would be material whether the official character of the arresting officer was known. An officer has a right to arrest under circumstances that give no such right to a private person. And where the citizen does not know, and has no grounds for knowing, that his assailant is an officer attempting to make a lawful arrest, he may make resistance and will not be liable therefor as he would if he knew of the officer's character: See *Yates v. People*, 32 N. Y. 509; *Logue v. Commonwealth*, 38 Pa. St. 265, 80 Am. Dec. 481; *Wolf v. State*, 19 Ohio St. 248.

**3. Resisting Arrest for Misdemeanor.**—An officer at common law had no right to arrest without a warrant for a misdemeanor not committed in his presence; and having no such right, the other party might resist the illegal attempt to arrest him. Except as already indicated in a previous part of this note, the right to arrest without a warrant for a misdemeanor not committed in an officer's presence has not been extended by statute. Hence, the rule stated above prevails practically universally, and a citizen may resist an arrest without process for a misdemeanor previously committed, and not in the officer's presence: See *Bad Elk v. United States*, 177 U. S. 529, 20 Sup. Ct. Rep. 729; *Hughes v. Commonwealth*, 19 Ky. Law Rep. 497, 41 S. W. 294; *Massie v. State*, 27 Tex. App. 617, 11 S. W. 638. In *Hughes v. Commonwealth*, 19 Ky. Law Rep. 497, 41 S. W. 294, it was held that an officer has no right to arrest a person on a mere suspicion that he is carrying concealed a deadly weapon, when he cannot detect the act; and the person whom he attempts to arrest may resist, though in fact he is guilty of the offense.

One who merely flees to avoid arrest is not resisting arrest. A fleeing misdemeanant does not, however, forfeit his right to defend his life. We have seen that an officer cannot kill an escaping person who has committed a misdemeanor. It has, therefore, been held that a person guilty of a misdemeanor who is fired on by a policeman while avoiding arrest may repel such attack in self-defense by returning the fire, and if in so doing he kills the policeman, such killing would not necessarily be unlawful: *Tiner v. State*, 44 Tex. 128. If an officer has no authority to arrest for the



violation of a city ordinance, the party arrested may lawfully resist: *State v. Belk*, 76 N. C. 10. The only way to determine whether a party has a right to resist an arrest is to ascertain whether the officer may lawfully make the arrest or not. We have previously gone quite fully into this latter right, and have seen under what circumstances an officer may, without a warrant, arrest for felonies, misdemeanors, and violations of municipal ordinances. For this reason it is unnecessary to further elaborate the cases in which a citizen may resist arrest by an officer. Reference is made to the earlier part of this note, where it is stated when the officer has and has not the right to arrest. Where this right of the officer exists, the citizen should submit to arrest. Where the officer has no right to arrest, the citizen may resist.

**4. Innocence Gives no Right to Resist.**—As has already been pointed out, a person who resists an officer in making an arrest cannot justify his resistance on the ground that the party arrested is not in fact guilty of the charge upon which he is arrested: *Montgomery v. Sutton*, 67 Iowa, 497, 25 N. W. 748; *State v. Symes*, 20 Wash. 484, 55 Pac. 626. The reason for this is that an officer may arrest a felon upon reasonable grounds for suspecting him guilty, and he may act upon the appearance of things and arrest for a breach of the peace in his presence, though in fact the person could not be convicted of such a crime.

**5. Force Used in Resisting.**—A person may resist an unlawful arrest the same as any assault: *Creighton v. Commonwealth*, 84 Ky. 103, 4 Am. St. Rep. 193. But he can use no more force than is absolutely necessary to repel the assault constituting the attempt to arrest: *Bad Elk v. United States*, 177 U. S. 529, 20 Sup. Ct. Rep. 729. He cannot go beyond the line of resistance proportioned to the character of the assault or he becomes a wrongdoer himself: *State v. Oliver*, 2 Houst. 606; *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711. A person cannot use excessive force to prevent the arrest: *Commonwealth v. Wright*, 158 Mass. 149, 35 Am. St. Rep. 475, 33 N. E. 82; *State v. Belk*, 76 N. C. 10. It has been said that a person should resort to all peaceable means of avoiding arrest before he can use force: *People v. Carlton*, 115 N. Y. 618, 22 N. E. 257. A person may, however, use such force as is necessary to make his resistance effectual. The degree of violence necessary always depends upon that used or attempted by his adversary: *Miers v. State*, 34 Tex. Cr. Rep. 161, 53 Am. St. Rep. 705, 29 S. W. 1074; *Creighton v. Commonwealth*, 84 Ky. 103, 4 Am. St. Rep. 193. An attempt to arrest one is ordinarily, however, only an attempt to take away one's liberty, and is not such an aggression as may be resisted to the death: *Creighton v. Commonwealth*, 84 Ky. 103, 4 Am. St. Rep. 193. The arrested person cannot resist with the intent to kill: *State v. Perrigo*, 67 Vt. 406, 31 Atl. 844. But if resistance by lawful means results in the death of the assailant, it

is excusable homicide: *State v. Scheele*, 57 Conn. 307, 14 Am. St. Rep. 106, 18 Atl. 256. "The citizen has the right to maintain his liberty at all hazards," said the court in *Ross v. State*, 10 Tex. App. 455, 38 Am. Rep. 643, "against any and all persons who attempt to invade it unlawfully, taking care not rashly to use or resort to greater violence than is necessary to its protection. Again, being in the right, he is permitted to anticipate the aggressor and prepare himself by drawing a weapon, or making any other preparations, and if his life is imperiled or he is in danger of serious bodily harm, to use every means in the defense of his person or liberty. He is not required to permit his assailant to take the lead, and thereby give him the advantage, but if the surroundings indicate a resort to a serious or deadly conflict on the part of the adversary, he can prepare to meet it, and if the adversary makes a demonstration upon his life or liberty, or shows an intent to inflict serious bodily harm upon him, he can kill him and be held blameless by the law of the land." In other words, a person in resisting an unlawful arrest may take the life of the trespasser, if it is necessary to save his own life, or to save himself from great bodily harm. He has in this respect the same right to take life as anyone else who is unlawfully assailed: *Creighton v. Commonwealth*, 84 Ky. 103, 4 Am. St. Rep. 193. As was said in *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711, "when such trespass is threatened or committed, he has no right to kill, unless the unlawful act, when properly and lawfully resisted by him, is persisted in by the trespasser until it ultimately results either in an actual necessity on his part to kill in order to prevent the commission of a felony or great bodily harm, or in the reasonable belief by him of the existence of such necessity." A more extreme doctrine seems to be laid down in some of the cases, but we doubt whether there was any intention of establishing any different rule than we have stated. Thus, in *Simmerman v. State*, 14 Neb. 568, 17 N. W. 115, it was held that a person resisting an unlawful arrest might, if it were necessary to choose between submission and killing his assailant, kill the person attempting the arrest. And in *Meuly v. State*, 26 Tex. App. 274, 8 Am. St. Rep. 477, 9 S. W. 563, the court said that "a citizen authorized to stand upon his individual rights may oppose force to force in the prevention of an attempted wrong, and when illegally restrained of his liberty may not only oppose force to force, but can increase that force even to the killing of his adversary, if necessary to prevent the attempted wrong." If one has been arrested and is illegally restrained of his liberty by a peace officer, he has the right to use such force, short of taking life, as is necessary to regain his liberty: *Goodman v. State*, 4 Tex. App. 349. And in attempting to escape, if the arresting officer tries to prevent this by the use of deadly weapons, the person arrested may resort to such weapons, and, if the party arresting

presents his gun in shooting position, commanding the party arrested and fleeing to halt, the latter may shoot, if it reasonably appears to him that the arresting party is about to shoot, and if he kills the arresting party, the killing is justifiable and excusable: *Miers v. State*, 34 Tex. Cr. Rep. 161, 53 Am. St. Rep. 705, 29 S. W. 1074. A person restrained of his liberty under an illegal arrest may use as much force as may be necessary to regain his liberty, even to the actual taking of life: *State v. Davis*, 53 S. C. 150, 60 Am. St. Rep. 845, 31 S. E. 62.

The right to resist an unlawful arrest may be exercised not only by the person unlawfully detained, but by another in his behalf, and with the force requisite to effect the release of the person so detained. And if homicide results from the use of lawful force it is not culpable: *Alford v. State*, 8 Tex. App. 545; *State v. Wimbush*, 9 S. C. 309.

**6. Officer Making Known His Character.**—An officer should make known his official character, if he is not known. A known officer of the law need not do so before the arrest: *Arnold v. Steeves*, 10 Wend. 514; *State v. Curtis*, 1 Hayw. 471; *Wolf v. State*, 19 Ohio St. 248. But, as has been seen, the right to resist may depend on the question whether the one arresting was an officer and known to be such, since a citizen may resist arrest in many cases where another private citizen attempts to make it, where no such right would exist if the person arresting were an authorized peace officer. Hence, in such cases the question becomes material: See *Wolf v. State*, 19 Ohio St. 248; *State v. Curtis*, 1 Hayw. 471; *White v. State*, 29 Tex. App. 530, 16 S. W. 340; *Commonwealth v. Tobin*, 108 Mass. 426, 11 Am. Rep. 375; *Yates v. People*, 32 N. Y. 509. If a private individual would have authority to make an arrest for an offense, an officer is not required to disclose his official character when he makes an arrest for the same crime, because the one arrested would have no right to resist in either case. But if a private person had no authority to arrest, and hence one could resist him in making the attempt, in such cases an officer should make himself known or he may be treated as any other unlawful assallant and resisted. We are not concerned in this note with the cases in which a private citizen may arrest, but only when an officer may, and the right to resist him. But in connection with the necessity of an officer making known his official character so as to deprive a citizen of the right to resist arrest, it may be said that a private citizen can arrest for a felony committed in his presence, for a past felony if one has actually been committed and he has reasonable cause to believe that the person arrested committed it, and for affrays and breaches of the peace committed in his presence: See, by way of illustration, *People v. Pool*, 27 Cal. 572; *Holley v. Mix*, 3 Wend. 350, 20 Am. Dec. 702; *Brockway v. Crawford*, 3 Jones, 433, 67 Am. Dec. 250. In these cases, then, where a private citizen may



arrest, an officer is not required to disclose his authority, but in other cases where, we have seen, an officer is authorized to arrest, and where a private citizen would have no such power, an officer should disclose his official character or a citizen may resist an arrest by him.

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### SANFORD v. HERRON.

[161 Mo. 176, 61 S. W. 839.]

**EJECTMENT—TENANTS AFTER JUDGMENT.**—Tenants of a defendant in ejectment are, after judgment for the plaintiff, estopped from turning over the possession to the grantee of their landlord.

**EJECTMENT—JUDGMENT—STATUTE OF LIMITATIONS.** A valid subsisting judgment in ejectment against one in possession, and claiming adversely, interrupted the peaceful possession of the defendant and suspended the running of the statute in his favor.

**EJECTMENT—STATUTE OF LIMITATIONS—WRIT OF RESTITUTION.**—In order to suspend the statute of limitations as against a plaintiff in ejectment, it is not necessary that a writ of restitution should issue, or that the plaintiff should take possession under his judgment.

**EJECTMENT—JUDGMENT—RES JUDICATA.**—A judgment in ejectment is res judicata as to the parties thereto and the matter adjudicated upon, until set aside or reversed, or its legal effect destroyed by the result of another action of ejectment for the same land by the parties or their heirs who were defendants therein.

**ADVERSE POSSESSION.—THE POSSESSION** of one room in a house will not prevent the statute of limitations from running against the remainder of the house if it was in actual adverse possession, but such room must be identified in order to be available as a defense against the statute of limitations.

**LANDLORD AND TENANT.—THE PAYMENT OF RENT** is a fact going to the establishment of a tenancy, but by no means sufficient in or of itself.

John M. Dickson, for the appellants.

E. P. Johnson, for the respondent.

**180 GANTT, J.** An action in ejectment in statutory form was commenced January 26, 1894, for a parcel of ground on Moore street, in block 211, of the city of St. Louis, twenty-five feet front or width, fifty feet in length or depth, being the south part of lot 4 in Moore's addition to said city, and alleged to be occupied by house No. 12 on Moore street. Mrs. Emilie Uhri and Miss Ida Rose, the sole heirs at law of Dr. Edward Rose, are the defendants who assert title, and the other defend-

ants are their tenants. Plaintiff claims under a tax deed and mesne conveyances from the grantee therein. The heirs of Dr. Rose claim under the foreclosure of a deed of trust given by John C. Blech, the common source of title, executed prior to the assessment and levy of the taxes for which the judgment for taxes was obtained.

Plaintiff's chain of title is as follows: <sup>181</sup> A sheriff's deed to Stephen Turner, dated and acknowledged May 11, 1882, under an execution issued on a judgment in favor of the state at the relation of Hudson, collector, v. John C. Blech, Charlotte Gebhart, and Michael Geary, for taxes of 1879. From the files in said case it appeared that summons was issued August 13, 1881, returnable to October term, 1881, of the circuit court of the city of St. Louis, and was personally served on John C. Blech, August 25, 1881, and a non est as to defendants Gebhardt and Geary. There was an allegation in the petition that Blech had conveyed the property to Michael Geary, as trustee, to secure a debt to Charlotte Gebhart, which deed of trust was recorded in book 340, page 316, of the recorder's office.

On October 13, 1881, an order of publication was made on the non est return, for the reason that the ordinary process of law could not be served on said Gebhart and Geary. The order recited the pendency of the suit for taxes of 1879 to the amount of twenty-two dollars and ten cents upon the following real estate, to wit: "A lot of ground on Moore street in the city of St. Louis, in city block 211, twenty-five feet in front, or width, and fifty feet in length, being the south part of lot No. 4 in Moore's addition to said city." The order was returned February term, 1882. The order was published four times in the "Post-Dispatch" newspaper; the first insertion was December 5, 1881, the second December 12, the third December 19, and the fourth December 26, 1881. Judgment was taken by default March 22, 1882. Execution issued April 8, 1882. Sale was advertised May 10, 1882, and was sold on that day to Stephen Turner for three hundred and five dollars, which, after satisfying the judgment and costs, left a surplus of two hundred and twenty-five dollars and sixty-two cents. These records were offered by defendant to show that "Mike Geary" and Dr. Rose were not parties to the suit.

Plaintiff next offered a warranty deed from Stephen <sup>182</sup> Turner and wife to Mary E. Tanner, dated May 18, 1882. On May 19th, Mary E. Tanner, by deed of trust, conveyed this lot to M. P. Jones, trustee for W. M. Dickey, to secure note

for fifteen hundred dollars. This deed of trust was afterward foreclosed on five days' public notice, and the lot conveyed to J. V. Hilton, October 25, 1883. By quitclaim, Hilton conveyed to John Oliver, December 13, 1883; filed for record December 17, 1884. John Oliver conveyed to plaintiff Sanford, August 20, 1890. deed recorded August 26, 1895.

Greffet, a real estate agent, testified he got the surplus of the tax sale, and gave it to Blech. He fixed the rental at twenty-two to twenty-five dollars a month, if kept in good condition, but the house was thirty-five years old and tenanted by negroes.

On the part of defendant the evidence was, first, proof that Mrs. Uhri and Miss Ida Rose were the sole heirs at law of Dr. Edward Rose, who died February 12, 1887; that Dr. Rose held the note and deed of trust given by John Blech to Mike Geary for the use of Charlotte Gebhart; that Blech paid the interest to Dr. Rose, up to 1883; that the deed of trust from Blech to Geary for Gebhart was foreclosed May 17, 1883. Twenty-two receipts for interest paid by Blech to Dr. Rose, beginning September 6, 1869, and ending October 12, 1880, were read in evidence. The note of Blech for fifteen hundred dollars, payable five years after date, to the order of Charlotte Gebhart was read in evidence; also assignment thereof by Charlotte Gebhart to Dr. Edward Rose. The same was also credited by Isaac Mason, who acted as trustee in the foreclosure, May 17, 1883, with nine hundred and forty-two dollars and eight cents, net proceeds of the sale of the lot on that day.

The deed of trust was also assigned by Charlotte Gebhart to Dr. Rose. This deed of trust was foreclosed May 17, 1883, and the property deeded to Dr. Rose.

<sup>1883</sup> On June 13, 1883, Dr. Rose brought ejectment for this lot against Isaac H. C. Curry, Lavina Curry, formerly Haskell, Moses Nevitt, and Simon Kane. Personal service was had on all defendants. Judgment was obtained by him December 12, 1883, for possession, and one hundred and sixty-six dollars and sixty-six cents damages, and monthly rents fixed at twenty-five dollars a month. Execution issued thereon January 23, 1884, and writ of possession executed January 28, 1884. After the defendants in ejectment were served they attorned to Dr. Rose, and continued as his tenants down to a comparatively recent time, when other tenants of defendant took possession and held until the commencement of this suit, January 26,



1894. One Albert Isbell, among others, became a tenant under Dr. Rose of said premises after the ejectment suit.

Manetho Hilton testified that he thought one Martha Stewart paid him a month's rent January 24, 1884. This woman was not a party to the ejectment suit and judgment rendered thereon December 12, 1883. Hilton says he represented John Oliver, who obtained a deed to the lot the day after Dr. Rose obtained his judgment in ejectment. He testified that not a cent of rent was paid to him or Miss Tanner or John Oliver after January 24, 1884. Witness had been applied to to bring this suit, but he refused. At another time this witness stated that Martha Stewart paid rent through Wolff & Co. up to January 24, 1884. Other evidence shows that Wolff & Co. were the agents of Dr. Rose and, after his death, of his daughters.

Upon the facts disclosed, little doubt can exist as to the merits of this case. They are all against the plaintiff.

The tax bill under which he claims appears to have been handed around from one to another as convenience might dictate. With absolute knowledge of Dr. Rose's possession of the lot in dispute from January, 1884, no effort was made to dispossess <sup>184</sup> him in his lifetime. He remained in possession until his death in 1887, when his title and possession devolved upon his two daughters, Mrs. Uhri and Miss Ida Rose. With no notice of an adverse claim, they have been permitted to receive the rents with which they are now charged. According to plaintiff's own theory, he and those under whom he claims have permitted an adverse, open, and peaceable possession to remain in defendants and their father for ten years, lacking one or two days, accordingly as they count the time. Hilton, for whom the parties seem to have held the tax title, says he declined to bring this suit. Unless it was held for him his self-denial is not apparent.

The vital question, as the answer is now framed, is whether plaintiff was not barred by the statute of limitations of ten years. As already said, plaintiff's own evidence establishes that Dr. Rose and his daughters, as his heirs, had been in the actual, open, adverse possession of the lot in suit for ten years prior to the commencement of this suit, lacking one day.

Defendants, insist, however, that Dr. Rose having foreclosed the deed of trust given him by Blech, the common source of title, and obtained his trustee's deed on May 17, 1883, and having thereafter brought his action of ejectment against the

tenants in possession and obtained his judgment for the possession of the lot December 12, 1883, and followed it up by his writ of possession and ouster on January 28, 1884, whatever possession, if any, plaintiff had by reason of the occupancy of said tenants, was interrupted from the date of that judgment, and the subsequent possession has been shown to be out of plaintiff since that date.

It must be kept in view that plaintiff and those under whom he claims assert possession through the defendants in the ejectment suit of Dr. Rose against Curry et al. In that <sup>185</sup> suit Dr. Rose obtained judgment on December 12, 1883, for the possession of the lot in question.

After the rendition of that judgment the defendants therein were estopped from longer remaining in possession as tenants of J. V. Hilton. Moreover, Hilton's claim expired December 13, 1883, by his quitclaim to Oliver. These tenants not only did not turn over, but were estopped from turning over, the possession to Oliver as against Dr. Rose, whose judgment in ejectment and writ with the possession thereunder were a constant assertion of adverse title from that day up to the bringing of this action over ten years thereafter, and Oliver and Sanford were never at one moment in lawful possession of the lot during all that time.

It has been often ruled that a judgment in ejectment against one in adverse possession breaks the continuity of the adverse possession. It was ruled, after careful examination, by this court in bank, in *Snell v. Harrison*, 131 Mo. 495, 52 Am. St. Rep. 642, 32 S. W. 37, that a valid subsisting judgment in ejectment against one in possession, and claiming adversely, interrupted the peaceable possession of the defendant and suspended the running of the statute in his favor, overruling *Ma-bary v. Dollarhide*, 98 Mo. 198, 14 Am. St. Rep. 639, 11 S. W. 611, so far as a different doctrine was announced on this point. The necessary result of that decision was to invest the plaintiff in the ejectment judgment with possession in law of his undivided part of the lands recovered. In *Estes v. Nell*, 140 Mo. 639, 41 S. W. 940, the question again arose as to the effect of a judgment in ejectment as between the parties and privies thereto, and it was held "it was not necessary, in order to suspend the statute of limitations as against the plaintiff (in ejectment), that a writ of restitution should have issued, or that they should have taken possession under that judgment. The running of the statute was interrupted, and did not run

against plaintiffs <sup>186</sup> during the life of the judgment, although no writ of restitution issued."

This last case correctly defines the effect of a judgment in ejectment. It is *res adjudicata* as to parties thereto and the matter adjudicated upon until set aside or reversed, or its legal effect destroyed by the result of another action of ejectment for the same land by the parties or their heirs who were defendants therein. While it does not prevent a defendant from yielding possession and bringing another action in ejectment to try the title, yet until he does so he and his privies are bound thereby.

What, then, was the effect of the judgment of December 13, 1883, upon the possession of J. V. Hilton, asserted through the occupancy of Curry et al., the defendants in that judgment? We answer that from the date of that judgment and during its life, the said defendants were conclusively estopped from recognizing Hilton as their landlord, or continuing his possession by any act of theirs, in opposition to the rights of Dr. Rose, the plaintiff therein. Unless this is so, it is idle to say that a judgment of a court of competent jurisdiction has any binding force upon the parties thereto.

While that judgment did not bar an action of ejectment in favor of Oliver, who purchased from Hilton the next day after the judgment, upon no sound principle of law can it be asserted that Oliver's quitclaim deed transferred to him the possession which had been adjudged to Dr. Rose, nor could the defendants therein whose possession had been adjudged tortious by the court, by a surreptitious payment of rent, put Oliver in possession, as it is well settled that a judgment in ejectment binds not only those against whom it is rendered, but all others who come in under them. Nor is there any legal evidence that they attorned or attempted to attorn to Oliver.

Within the contemplation of law, whatever rights Oliver <sup>187</sup> may have had to bring his own action of ejectment, from the date of that judgment, Curry et al., the defendants in the ejectment, were estopped from denying they held under Dr. Rose, and their possession, as between him and them, was his possession, and this continued up to the time they attorned to Dr. Rose, which they were authorized by our statute to do. As is said in *Prior v. Scott*, 87 Mo. 309: "Where the prior possessor has been turned out by an opposing claimant in judicial proceedings, all presumptions in his favor growing out of said



prior possession, if not terminated, are at least shifted in favor of his successful opponent."

It results, then, that upon the admitted state of facts shown by this record, whatever possession those under whom plaintiff claims held through the defendants in that ejectment passed to Dr. Rose by his recovery in that case, and it has remained in him and his heirs continuously since the 12th of December, 1883, the plaintiffs and those under whom he claims have been ousted by an adverse possession for more than ten years and the court erred in not giving defendants' first instruction.

2. One other point only needs to be noticed. It was attempted to show a possession of one room by one Martha Stewart. As to this claim it is sufficient to say that every presumption is against the bona fides of this claim. At most, it would not affect the recovery of all the premises outside of that room, and still the judgment must have been for defendants for all save that room, but the evidence is wholly insufficient to sustain a recovery outside of that consideration, for the reason that it utterly fails to designate the room which it is alleged she occupied at that time.

Moreover, there is no proof that she was a tenant of any part of said building. Nagle says Stewart and Curry were one. Every presumption upon the facts disclosed in evidence <sup>188</sup> is, that if she was in the house, she was there in subordination to Curry, who was sued and ejected. Nothing was attempted to be shown further than she was there in the house and on one occasion paid Wolff & Co. some rent.

The payment of rent is a fact going to the establishment of a tenancy, but by no means sufficient in or of itself. Out of all the owners of this tax title it surely would have been an easy matter to have shown that Martha Stewart was a lessee of that building at the time the ejectment was brought: Taylor on Landlord and Tenant, sec. 23.

All the evidence tending to show Martha Stewart was a tenant of J. V. Hilton or Oliver amounts at most to a scintilla, and can form no basis of recovery in an ejectment wherein the burden is on the plaintiff. As the whole title of the respective parties is before the court, no good purpose can be subserved by another costly trial, and as in our opinion plaintiff can never recover against defendants, the judgment is reversed with directions to enter judgment for defendants.

All concur.

**A Judgment in Ejectment was not a Bar to another and similar action at the common law, but this rule has been changed in many states by statute:** Note to *Caperton v. Schmidt*, 85 Am. Dec. 208-211. See, also, *Lake v. Hancock*, 38 Fla. 53, 56 Am. St. Rep. 159, 20 South. 811; *Hentig v. Redden*, 46 Kan. 231, 26 Am. St. Rep. 91, 26 Pac. 701; *German-American Title etc. Co. v. Shallcross*, 147 Pa. St. 485, 30 Am. St. Rep. 751, 23 Atl. 770.

**Limitations.**—A judgment in ejectment, although it establishes a right to possession, does not create a new estate nor vest a new title in the plaintiff, so as to interrupt the running of the statute of limitations: Note to *Snell v. Harrison*, 52 Am. St. Rep. 648.

## HUTCHINSON v. MISSOURI PACIFIC RAILWAY CO.

[161 Mo. 246, 61 S. W. 635, 852.]

**RAILWAYS—NEGLIGENCE.—THE FAILURE TO RING THE ENGINE-BELL** of an approaching train is not such negligence as contributes to a resulting injury, where the person injured was fully aware of the approach of the train by hearing its whistle and seeing its headlight.

**RAILWAYS — NEGLIGENCE — SPEED — ORDINANCE.**—It is negligence per se to run a train at a rate of thirty-five miles an hour in a city in violation of an ordinance prohibiting a speed of more than six miles an hour.

**RAILWAYS — NEGLIGENCE—PRESUMPTION.—WHERE A CITY ORDINANCE** limits the speed of a railway train, the law will presume, in the absence of proof to the contrary, that one crossing a railroad track acted upon the assumption that an approaching train was running at a speed not in excess of the prohibited rate.

**RAILWAYS — NEGLIGENCE — CONTRIBUTORY—QUESTION FOR JURY.**—Where a railroad company is guilty of negligence per se, and there is some evidence that the person injured was also negligent, it is for the jury whether the negligence of the person injured is such as will preclude a recovery.

A. R. Taylor, for the appellant.

Martin L. Clardy, for the respondent.

**250 VALLIANT, J.** This is a suit for damages for the killing of plaintiffs' mother, which they allege was caused by the negligence of defendant. The plaintiffs are minors, suing by their next friend; their mother was a widow.

The allegations of the petition are, that the plaintiffs' mother, on January 3, 1892, was struck and instantly killed by an engine drawing a passenger train within the limits of the city

of St. Louis, while she was in the act of crossing the track at a passenger station, with a view of reaching a platform provided by defendant for that purpose, from which she intended taking passage on a train of defendant. The acts of <sup>251</sup> negligence charged are, that the defendant ran its engine and cars without ringing the bell for the crossing as the statute requires, and ran the train at the speed of thirty miles an hour within the city, in violation of an ordinance of the city, which provided that it was unlawful to run it at a higher rate than six miles an hour. The prayer of the petition is for judgment for five thousand dollars.

The answer admits that the ordinance was in force at the time of the accident, but avers that it was repealed in 1893, denies all other allegations, and sets up a plea of contributory negligence, which is denied by the reply.

The evidence for plaintiff tended to show the following: Benton, where the accident occurred, is a station on defendant's road in the western part of the city. Defendant has a station-house there on the north side of its tracks, for the accommodation of its passengers; it has double tracks, the north track for the west-bound and the south for the east-bound trains. There was a platform on each side of the tracks, that on the south side being designed for passengers taking the east-bound trains. To go from the station-house to the south platform one would cross both tracks. On January 3, 1892, Mrs. Hutchinson, the plaintiffs' mother, came to this station with the purpose of taking the accommodation train, as it was called, going east, which train was due there at 6:38 P. M. The exact time of her arrival at the station is not established, but is approximately given. It was stated that she had left the house of her daughter to go to the station about 6 o'clock, and the distance was about a half mile. A witness, Mr. Banghart, who was in the station with her, estimated it to be about 6:20 P. M., when they heard the whistle, and she and he went out of the station together to cross over to the south platform. Another witness thought it was within three or five minutes of the time for the accommodation train. Ellendale is a <sup>252</sup> station a half mile to the west. A train at Ellendale coming east could be clearly seen from the platform in front of the station on the north side of the tracks at Benton, and from the north track and from the space between the tracks; but from the platform on the south side it could not be seen for more than three hundred or five hundred feet, owing to an



embankment and pile of ties obstructing the view. Mrs. Hutchinson was in the habit of visiting her daughter and had frequently taken the train from that station, but usually went in on an earlier train. The night of the accident was cold and dark. Mrs. Hutchinson and Mr. Banghart were in the station-house, where there was a light and fire, awaiting the accommodation train. She had a ticket to the Union station. They heard a whistle in the direction of Ellendale, when Mrs. Hutchinson said, "That is our train; we will have to be in a hurry," and she and Banghart immediately arose and went out on the platform in front of the station, where they stopped and looked west. The headlight of the train coming from Ellendale was plainly visible. She said, "This is our train; we better be in a hurry to get across." They both started to go across the tracks, Mrs. Hutchinson a little ahead, but Mr. Banghart passed her; when she reached the middle of the south track she dropped a lace scarf she was carrying in her hand, and paused and stooped to pick it up; she caught it, but while she was rising and before she had attained an erect position the engine of the approaching train, which proved to be the mail train, running at the speed of thirty-five miles an hour, struck her and killed her instantly. Banghart barely reached the platform in safety. The train stopped about a hundred yards from the point of the accident in consequence of it. That station was not a stopping point for that train and but for the accident it would not have stopped there at all. The witnesses all testified that they heard no bell, but they all <sup>253</sup> heard the whistle at Ellendale and saw the headlight. At the close of the plaintiff's evidence the court gave an instruction to the effect that the plaintiffs were not entitled to recover, whereupon they took a nonsuit with leave, and after an ineffectual motion to set it aside have brought the cause here for review.

1. The fact, if it be a fact, that the engine bell was not rung as the statute requires is immaterial under the other facts of the case. The object of ringing the bell is to give notice of the approach of the train; but in this instance that was unnecessary, because Mrs. Hutchinson heard and recognized the whistle and saw the headlight; she knew the train was coming and required no further warning. The failure to ring the bell, though an act of negligence, could not have contributed to the catastrophe.

2. But the city ordinance forbade the running of the train at a higher rate than six miles an hour, and this train was running at the rate of thirty-five miles an hour.

That act was negligence per se, and if it was the cause of the accident, the defendant was liable unless the deceased contributed to the result by her own negligence. This proposition has been so often and so elaborately discussed and demonstrated, and as a rule of law so often declared by this court, that it is now only necessary to restate it and cite some of the decisions in which it is discussed: *Karle v. Kansas City etc. R. R. Co.*, 55 Mo. 476; *Bowman v. Chicago etc. R. R. Co.*, 85 Mo. 533; *Merz v. Missouri Pac. Ry. Co.*, 88 Mo. 672; *Keim v. Union Ry. etc. Co.*, 90 Mo. 314, 2 S. W. 427; *Rafferty v. Missouri Pac. Ry. Co.*, 91 Mo. 33, 3 S. W. 393; *Eswin v. St. Louis etc. Ry. Co.*, 96 Mo. 290, 9 S. W. 577; *Schlereth v. Missouri Pac. Ry. Co.*, 96 Mo. 509, 10 S. W. 66; *Grube v. Missouri Pac. Ry. Co.*, 98 Mo. 336, 14 Am. St. Rep. 645, 11 S. W. 736; *Kellny v. Missouri Pac. Ry. Co.*, 101 Mo. 68, 13 S. W. 806; *Murray v. Missouri Pac. Ry. Co.*, 101 Mo. 236, 20 Am. St. Rep. 601, 13 S. W. 817; *Hanlon v. Missouri Pac. Ry. Co.*, 104 Mo. 381, 16 S. W. 233; *Bluedorn v. Missouri Pac. Ry. Co.*, 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103; *Gratiot v. Missouri Pac. Ry. Co.*, 116 Mo. 450, 21 S. W. 1094; *Prewitt v. Missouri etc. Ry. Co.*, 134 Mo. 615, 36 S. W. 667.

254 When the plaintiffs' mother heard the whistle in the direction of Ellendale, and went out on the platform and there saw the headlight of the approaching train, if she knew or could discern the rate of speed at which it was approaching and had attempted to cross the tracks as she did, she would have been guilty of such negligence as would prevent a recovery. Whether, in the darkness of the night and under the circumstances surrounding her, she is to be regarded as knowing or capable of discerning the speed at which the train was coming, is a question of fact upon which minds might reasonably differ, and the court could not settle it as a matter of law. And as it is a fact of common experience that railway trains, as they lawfully may, not infrequently do run past some passenger stations without stopping and at a rate of thirty-five or forty miles an hour, if the plaintiffs' mother, without knowing and without being able to discern the speed of the train, had assumed that it was running at a less rate, and, acting on that assumption, had attempted to cross as she

did, the court would have been justified in adjudging her negligent, unless there was some other fact in the case to justify her assumption. But there was that other fact in this case. The city ordinance prohibited the train running at a higher rate than six miles an hour, and, in the absence of proof that she knew or had reason to apprehend to the contrary, the law will presume that she trusted, as she had a right to trust, that the defendant was running its train at not more than six miles an hour in obedience to the ordinance, and that she regulated her movements accordingly. This court has frequently so declared the law: *Eswin v. St. Louis etc. Ry. Co.*, 96 Mo. 290, 295, 9 S. W. 577; *Kellny v. Missouri Pac. Ry. Co.*, 101 Mo. 67, 77, 13 S. W. 806; *Jennings v. St. Louis etc. Ry. Co.*, 112 Mo. 268, 276, 20 S. W. 490; *Gratiot v. Missouri Pac. Ry. Co.*, 116 Mo. 450, 464, 21 S. W. 1094; *Sullivan v. Missouri Pac. Ry. Co.*, 117 Mo. 214, 222, 23 S. W. 149.

<sup>255</sup> Even with the train running as it was at thirty-five or forty miles an hour, the movements of the plaintiffs' mother were such that she had reached the middle of the south track, and had almost reached the platform, as Banghart, who started across with her, in fact had done, when the engine struck her. It is, therefore, entirely reasonable to conclude that if the train had approached at the rate of only six miles per hour, she would have passed in safety, even though she paused to pick up the scarf which had dropped. If, then, she was acting, as the law, in the absence of any proof to the contrary, will presume she rightfully was, on the assumption that the train was approaching at the rate of not more than six miles an hour, the court had no right to conclude, as a matter of law, that her conduct was not such as might be expected of a reasonably prudent person. The question of whether, under those conditions, she was guilty of negligence was one of fact for the jury. The instruction in the nature of a demurrer to the evidence ought not to have been given.

The judgment is reversed and the cause remanded to the trial court to be retried in accordance with the law as herein declared.

All concur, except Marshall, J., who dissents.

IN BANK.

PER CURIAM. The foregoing opinion filed by Judge Valiant in this cause, while it was pending in division No. 1 of the



court, is approved and adopted as the opinion of the court in bank, by the majority of our number.

Burgess, C. J., Brace and Gantt, JJ., concurring in said opinion.

Robinson, Sherwood, and Marshall, JJ., dissenting.

256 ON MOTION FOR REHEARING.

VALLIANT, J. The motion for rehearing proceeds upon a misconception by the learned counsel of the opinion delivered. There is nothing in that opinion to indicate "that notwithstanding the deceased saw, or might have seen, the train within a few feet of her when she went upon the track, she had the right to presume that she could cross in safety, and when the engine was almost on her she had the right still to indulge the presumption that she could do so and stoop to recover a scarf she had dropped." Nor does the opinion hold "that the prior and concurring negligence of the company in running its train at a prohibited rate of speed relieves deceased's representatives from the consequences of that act," nor "that the evidence of her negligence ought to be disregarded for the reason that she could not be negligent because she had a right to assume that the persons in charge of the train would observe the ordinance limiting its speed to six miles an hour."

The opinion says: "That act [running the train in violation of the ordinance] was negligence per se, and if it was the cause of the accident, the defendant was liable unless the deceased contributed to the result by her own negligence." It holds that in considering the question of her negligence the ordinance was a fact to be taken into account, and that that raised a question of fact. But there is no intimation in the opinion that that presumption, that she relied on the ordinance, is to be taken as conclusive. The language of the opinion is: "The city ordinance prohibited the train running at a higher rate than six miles an hour, and in the absence of proof that she knew or had reason to apprehend to the contrary, the law will presume that she trusted, as she had a right to trust, that the defendant was running its train at not more than six miles an hour in obedience to the ordinance, and that she regulated  
257 her movements accordingly." That leaves the defendant entirely free to show, if it is a fact, that the circumstances and conditions were such as that, notwithstanding the ordinance, she had reason to apprehend that the train was running at a

higher rate than that prescribed. This defendant has met that issue frequently and knows how to handle it.

Nor is there anything in the record to justify the assumption that Mrs. Hutchinson stopped within fifty or eighty feet of the engine to pick up her scarf. The facts clearly shown are that she was sitting in the station at night, waiting for a train; she heard a whistle, and said, "That is our train; we must be in a hurry." She went out on the platform and saw the headlight of the approaching train, which was then at Ellendale and clearly visible, although it was half a mile away; it was a dark night, and whether she could in fact see how fast the train was coming was a question. But the opinion says, if there was nothing in the case to justify her in thinking that the train was running at a slow rate, she was chargeable with knowledge that the train might lawfully run by the station at forty miles or more an hour, and if she ventured upon the track she did so at her peril. But the fact of the ordinance was a fact that might enter into her calculation, unless she had reason to apprehend the train was running in violation of the ordinance, and that that made a question for the jury. If the train was running in submission to the ordinance, it would have taken it just five minutes to have covered the distance from Ellendale to the point of the accident, but at forty miles an hour the distance was made in less than one minute.

The motion for rehearing is overruled.

Burgess, C. J., and Brace and Gantt, JJ., who concurred in the original opinion, concur in the above.

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**Railroads—Unlawful Speed.**—Knowledge by a person that a railway company habitually runs its trains at an excessive speed in violation of law does not render him guilty of contributory negligence merely because he does not act upon the assumption that the train by which he is injured would so run: *Hasle v. Alabama etc. Ry. Co.*, 78 Miss. 413, ante, p. 632, 28 South. 941. The running of the train in violation of the ordinance is negligence per se: *Jackson v. Kansas City etc. Ry. Co.*, 157 Mo. 621, 80 Am. St. Rep. 650, 58 S. W. 32. See, also, *St. Louis etc. Ry. Co. v. Stewart*, 68 Ark. 606, 82 Am. St. Rep. 311, 61 S. W. 169; *Highland etc. R. R. Co. v. Robbins*, 124 Ala. 113, 82 Am. St. Rep. 153, 27 South. 422. •

**Railroads.**—Failure to give warning of approaching trains, by sounding bells or whistles, as affecting the liability of the railway company for injuries to persons attempting to cross the track, is considered in *Hicks v. New York etc. R. R. Co.*, 164 Mass. 424, 49 Am. St. Rep. 471, 41 N. E. 721; *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160, 49 Am. St. Rep. 21, 15 South. 511; *Baltimore etc. Ry. Co. v. Bradford*, 20 Ind. App. 348, 67 Am. St. Rep. 252, 49 N. E. 388.

**KANSAS AND TEXAS COAL RAILWAY v. NORTH-  
WESTERN COAL AND MINING COMPANY.**

[161 Mo. 288, 61 S. W. 684.]

**EMINENT DOMAIN—RAILROADS—COLLATERAL PROCEEDING.**—The right of a railroad, regularly incorporated under the laws of a state, to exercise the power of eminent domain, cannot be inquired into and taken away in a collateral proceeding.

**EMINENT DOMAIN—PUBLIC RAILROAD.**—A railroad regularly incorporated under the laws of a state is a public, and not a private, corporation, and may exercise the power of eminent domain, although its officers and stockholders are the same as those of a business corporation from which it has borrowed money.

**EMINENT DOMAIN—RAILROAD A PUBLIC USE.**—The condemnation of land for the purpose of constructing and operating thereon a railroad is, in its very nature, the taking of land solely for a public use.

**EMINENT DOMAIN—RAILROADS—PUBLIC USE—VOLUME OF BUSINESS.**—The condemnation of land for railroad purposes is a public use, whatever may be the length of the road or the volume of business likely to be done.

**EMINENT DOMAIN—RAILROADS—OTHER REMEDIES.** The fact that a statute gives to a private business concern the right to reach a neighboring railway by means of a switch or a tramway is not an exclusive remedy, and will not take away the right of eminent domain from a regularly incorporated railway company.

**EMINENT DOMAIN—RAILROADS—NECESSITY FOR LOCATION.**—The power of eminent domain conferred upon railroad companies gives them the privilege of selecting whatever location they prefer, and the exercise of this power cannot be denied because some other location may be as good or better.

**EMINENT DOMAIN—LAND SUBJECT TO—DEFENSE.**—The fact that land sought to be condemned for a public use is held, owned, and used by a corporation organized for private gain is no defense to the right of condemnation.

**EMINENT DOMAIN.—PROPERTY ALREADY DEVOTED TO A PUBLIC USE** may be acquired under the power of eminent domain, provided it is not taken from one corporation by another to be used for the same purpose and in the same manner that it was used by the corporation that first appropriated it.

**EMINENT DOMAIN—CONSTITUTIONAL LAW.**—The legislature cannot exempt from condemnation property owned by a corporation, and make subject to condemnation the same class of property if owned by an individual.

**EMINENT DOMAIN—FUTURE CONDITIONS.**—In condemnation proceedings courts must deal with conditions as they exist at the time the condemnation is asked, and cannot take into account conditions that may arise thereafter.

Adiel Sherwood, for the plaintiff in error.

Ben Eli Guthrie and Dysart & Mitchell, for the defendant in error.



**302** MARSHALL, J. The plaintiff is a duly organized and chartered railroad company, under the provisions of article 2 of chapter 42 of the Revised Statutes of 1889, for the purpose of constructing and operating a broad gauge railroad "for public use in the conveyance of persons and property from a point in, at, or near the town of Ardmore, Macon county, Missouri, to a point in, at, or near the town of Bevier, in the same county and state, a distance of ten miles or more." The plaintiff is also the lessee for a term of twenty years from July 1, 1899, from the Wabash railroad of its branch railroad from Excello to Ardmore. So that the plaintiff's railroad with the leased line aforesaid will form a continuous railroad from the town of Excello, on the Wabash railroad, to the town of Bevier, on the Hannibal and St. Joseph Railroad. The defendant, the Northwestern Coal and Mining Company, is a business corporation, organized under the provisions of article 8 of chapter 42 **303** of the Revised Statutes of 1889, for the purpose of acquiring, selling, and operating coal lands and coal mines, and to buy, sell, and deal in merchandise, and to own, operate, and sell electric light and power plants and to furnish and sell electric light and power. The said defendant holds, as owner or lessee, considerable land on which there have been opened and are being operated coal mines, and, in connection with the defendant Watson, owns a railroad and right of way therefor, beginning at a mine owned by defendant Watson and located several thousand feet southeast of the coal company's mine, and extending in a general northwardly direction, to and beyond the mine of the coal company, called "mine No. 7," and to or near a bridge over Sulphur creek, at which point it connects with a railroad owned by the Kansas and Texas Coal Company (likewise a business corporation), and over which last-named road the cars of the railroad owned by the defendant coal company and Watson are run under a contract therefor with the Kansas and Texas Coal Company for a distance of about thirteen hundred feet, to the town of Bevier, on the line of the Hannibal and St. Joseph Railroad. In this way the output of coal from the Watson mine and the Northwestern Coal and Mining Company's mine No. 7, is transported to the line of the Hannibal and St. Joseph Railroad, and over that road to the markets of the world.

The mine of the Northwestern Coal and Mining Company, called mine No. 7, was leased by that company to the Kansas and Texas Coal Company, on the 15th of March, 1898, for a

term beginning on the 1st of January, 1898, "until such time as the coal in and underlying said lands shall be entirely worked and in the manner" provided in the lease, unless the lease is sooner terminated as therein provided. The lease provided that the lessor was to receive a royalty of five and one-half cents per ton of two thousand pounds, and that the lessee should so operate the mine that the royalty should exceed or equal the <sup>304</sup> sum of five hundred and fifty dollars a month, and the lessee should also pay such royalty of five and one-half cents per ton on all coal mined in excess of one hundred and twenty thousand tons a year. The lessor reserved the right to cancel the lease on the 1st of April, 1901, or on the 1st of April of any subsequent year by giving six months' notice of intention so to do.

Under the terms of this lease the Kansas and Texas Coal Company is, and at all the times since the date of the lease has been, operating mine No. 7, and the average daily output of the mine is seven hundred tons, while that from the Watson mine is from five hundred to six hundred tons daily.

The railroad of the Kansas and Texas Coal Company, over which the cars of the defendant run from Sulphur creek to Bevier extends southwestwardly from the intersection of those roads to mine No. 43, which mine is also operated by the Kansas and Texas Coal Company.

This was the condition of affairs on the 16th of April, 1899, when the Kansas and Texas Coal Railway instituted this proceeding, under the provisions of article 6, chapter 42, of the Revised Statutes of 1889, for the purpose of condemning a right of way over five pieces of real estate, three of which pieces lie immediately east of the main line of the railroad of the Northwestern Coal and Mining Company, and such strips commence seven feet east of the center line of the main or most eastward track of the Northwestern Coal and Mining Company's railroad, and extend from Sulphur creek for a distance of some three thousand seven hundred feet to a point seventeen hundred feet south of mine No. 7, where it is proposed to cross the railroad of the Northwestern Coal and Mining Company. In other words, the purpose of this suit is to condemn a right of way for the plaintiff railroad beginning at Sulphur creek and paralleling the most easterly track of the Northwestern Coal and Mining Company's railroad for a distance of three thousand seven hundred feet, and there crossing the defendant's <sup>305</sup> track, so as to proceed to the town

of Ardmore. The western line of the right of way sought to be acquired by the plaintiff is seven feet from the center of the defendant's main or most easterly track, and the center of the plaintiff's track is fourteen feet from the center of the defendant's main track.

The plaintiff's petition is in the usual and proper form. The answer of the defendant, the Northwestern Coal and Mining Company, is a general denial and special defenses. The special defenses are: 1. That the plaintiff has not the right to condemn land; 2. That the St. Louis Trust Company is a necessary party defendant, because it is the holder of bonds issued by the Kansas and Texas Coal Company; 3. That the plaintiff is not a public railroad corporation, and has no intention to build a railroad for public use, "but that the plaintiff corporation has been promoted and organized by, and is owned and belongs to, the defendant, the Kansas and Texas Coal Company; that said coal company and said railway have the same officers and largely, if not entirely, the same stockholders; that the Kansas and Texas Coal Company owns and controls a large number of mines and coal lands in Macon county, near Bevier and Ardmore, and between those two places, and has furnished the plaintiff company about seventy thousand dollars to build the road, and holds a mortgage therefor on the plaintiff company's property; that the plaintiff railroad is organized solely in the interest and for the benefit of the Kansas and Texas Coal Company," and avers that it would be a fraud to take the defendant's property for the purpose of a right of way for the plaintiff railway; 4. That the defendant coal company is engaged in the mining business near Bevier, and owns the land the plaintiff railway proposes to condemn, and in connection with defendant Watson it has built and owns and operates a railroad to carry its coal to the Hannibal and St. Joseph Railroad for shipment to the markets; <sup>306</sup> that it has only a right of way of forty feet, and that all of it is necessary for the proper operation of its mines and railroad; that plaintiff's proposed right of way is within seven feet of the center line of defendant's railroad, and if plaintiff is allowed to condemn the right of way so described, it will largely, if not wholly, destroy the defendant's business, and that the plaintiff ought not to be allowed, under the guise of building a railroad, to destroy the business of the defendant for the benefit of its rival in business, the Kansas and Texas Coal Company; 5. That the construction of the plain-



tiff's road as contemplated would also ruin Watson's business, and would force him and the defendant coal company to use the plaintiff's road, and put them at the plaintiff's mercy as to charges and railroad rates; 6. That there is no necessity for the plaintiff to condemn this land, because it owns a right of way one hundred feet wide adjoining the defendant's right of way on the east, and the plaintiff could and should be compelled to build the road on the land it already owns; 7. That it is inequitable, unjust, and contrary to law and good conscience to allow the plaintiff to condemn this land, since it is not for a public purpose, but for the benefit of the Kansas and Texas Coal Company, and that "its business would be greatly injured, not to say ruined, by allowing plaintiff to build and construct the railroad upon the line marked out." The answer asks that the petition be dismissed, that the court refuse to appoint commissioners to assess damages, and that the plaintiff be enjoined from condemning, or attempting to condemn, a right of way along the specified line or from building a railroad thereon.

The trial court heard evidence upon the issues so raised by the answer, and decided that the plaintiff had a right to condemn land, as the purpose was a public use, but that the condemnation and use by the plaintiff railroad of the three tracts of land owned by the defendant coal company would materially <sup>307</sup> interfere with the uses which the defendant coal company is authorized by law to subject such lands to, and therefore the plaintiff could not condemn this land under section 2741 of the Revised Statutes of 1889, and hence the court refused to appoint commissioners to assess the damages and entered a final judgment for the defendants. After proper steps the plaintiff brought the case to this court by writ of error.

1. The plaintiff is a regularly organized and chartered railroad company under the laws of this state, and therefore it has power of eminent domain to condemn land for a right of way not exceeding one hundred feet wide. This is conceded by defendants as a general proposition, in this case, and it is further conceded by the defendants that a railroad charter, regular on its face, cannot be attacked or questioned collaterally or in any manner except by quo warranto. But it is contended by the defendants: 1. That the plaintiff is a private, and not a public, railroad, and therefore it has no power of eminent domain; and 2. That the use to which the land here attempted

to be condemned and appropriated and applied is a private, and not a public, use.

In support of the first contention, it is claimed that the plaintiff is a mere tool or creature of the Kansas and Texas Coal Company; that the officers and directors of the two are the same, and the stockholders substantially the same; that the coal company furnished seventy thousand dollars to the plaintiff to build its railroad, and holds a mortgage on its property for that amount, and that the coal company owns large coal mines and large tracts of coal lands in Macon county, near Bevier and Ardmore and between those places, and that the plaintiff is organized solely for the purpose of benefiting the coal company, <sup>308</sup> and hence the plaintiff is a private, and not a public, railroad. And in support of the second contention it is claimed that the first contention being true, the use to which the land is to be applied is a private, and not a public, use.

If, as it is conceded, the plaintiff is a regularly organized railroad company, and its charter and rights cannot be questioned except by quo warranto, it is difficult to understand how the courts in a proceeding of this character can hear evidence as to whether the officers, directors, or stockholders of the plaintiff company are the same as those of the Kansas and Texas Coal Company, or whether the coal company loaned the plaintiff company seventy thousand dollars or any other sum. For, if all this be conceded, it would avail nothing in this case, unless the rights inherent in and expressly granted to a railroad company could be inquired into and taken away from such a company in a collateral proceeding: *National Docks Ry. Co. v. Central Ry. Co.*, 37 N. J. Eq. 755-760. But aside from this, the contention is untenable. There is nothing in the letter or spirit or policy of the law which prohibits the same persons from forming and conducting two or more different corporations, one a business and the other a railroad company. Neither is there any prohibition in the law against a railroad company borrowing money, on bonds secured by mortgage on its property, to build and operate its road, from a business corporation rather than from a bank, a trust company or an individual.

The second contention is equally untenable. The charter of the plaintiff and the laws of this state expressly require the plaintiff to transport persons and freight, and the plaintiff can be compelled by mandamus to do so if it refuses. The fact that almost the entire volume of business now in sight for the plaintiff to do will be the transportation of coal produced by

the Kansas and Texas Coal Company does not destroy the character of the plaintiff as a railroad company, nor convert it into a <sup>309</sup> private, and not a public, railroad, nor does it make the use to which the land sought to be condemned is to be applied any the less a railroad right of way and therefore a public use. So long as the company holds its charter, it speaks in the name of the state when it comes into court and asks to condemn land for a railroad right of way, and it would be intolerable that whenever it seeks to exercise the extraordinary power by this summary process, the courts should stop to inquire into the charter or regularity or legality of its organization, or into the motives of the incorporators or their relations to or holdings in other corporations of a different character. The law is settled in this and other states that the use of land for railroad tracks is a public use: *St. Louis etc. Ry. Co. v. Hannibal Union Depot Co.*, 125 Mo. 82, 28 S. W. 483; *Dietrich v. Murdock*, 42 Mo. 279; *Chicago etc. Ry. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931; *Contra Costa Coal Mines R. R. Co. v. Moss*, 23 Cal. 328; *Colorado Eastern Ry. Co. v. Union Pac. Ry.*, 41 Fed. 293; *De Camp v. Hibernia R. R. Co.*, 47 N. J. L. 44; *St. Louis etc. Ry. Co. v. Petty*, 57 Ark. 359, 21 S. W. 884; *Arkansas etc. R. R. Co. v. St. Louis etc. Ry. Co.*, 103 Fed. 747.

So that while it is true that the constitution (article 2, section 20) provides, "that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public," it is also true that it has been judicially determined that the use of land for a railroad right of way is a public use and not a mere private use.

There can be no doubt that if the Wabash railroad was asking to condemn this land to extend its branch that now runs from Excello to Ardmore so as to reach these coal mines, or if the Hannibal and St. Joseph Railroad was seeking to condemn a right of way for a branch from Bevier to these coal fields, it <sup>310</sup> would be a condemnation of land for a public use. And if either of these existing roads did this they would serve the same public purpose, get the same business, and act under, and be subject to, the same laws, as the plaintiff is seeking to do. There is no difference in right or in principle whether it be done by either of those great railroad systems as a mere branch thereof, or whether it be done by the plaintiff, whose road and



leased line is only about a dozen miles in length. The length of the road does not determine the right or the nature or character of the use of the land. Many roads of less mileage than the plaintiff's serve most useful public purposes, are almost indispensable to commerce, and are veritable gold mines to their owners. The output from mine No. 7, leased by the defendant coal company to the Kansas and Texas Coal Company, averages seven hundred tons a day. This alone is quite a considerable business, and if the plaintiff company serves no other purpose than to help to get that much coal to the markets every day, it will serve a most useful public purpose, even if it gets no other business, and, as herein pointed out, it can be compelled to carry other freights and passengers.

This case is not without precedent in the law, and all of the defenses that are made here have been made and held insufficient in other cases. A reference to a few will suffice: *Dietrich v. Murdock*, 42 Mo. 279; *Contra Costa Coal Mines R. R. Co. v. Moss*, 23 Cal. 323; *Colorado Eastern Ry. Co. v. Union Pacific Ry. Co.*, 41 Fed. 293; *New Central Coal Co. v. George's Creek Coal etc. Co.*, 37 Md. 537; *Powers v. Hazelton etc. Ry. Co.*, 33 Ohio St. 429; *Butte etc. Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232; *National Docks Ry. Co. v. Central Ry. Co.*, 32 N. J. Eq. 755; *De Camp v. Hibernia R. R. Co.*, 47 N. J. L. 44; *Dayton Gold Min. Co. v. Seawell*, 11 Nev. 394; *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147; *Boyd v. Negley*, 40 Pa. St. 377; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659.

<sup>311</sup> The cases of *Dietrich v. Murdock*, 42 Mo. 279, *Contra Costa Coal Mines R. R. Co. v. Moss*, 23 Cal. 323, *Colorado Eastern Ry. Co. v. Union Pac. Ry. Co.*, 41 Fed. 293, *New Central Coal Co. v. George's Creek Coal etc. Co.*, 37 Md. 537, *Powers v. Hazelton etc. Ry. Co.*, 33 Ohio St. 429, *Butte etc. Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, *De Camp v. Hibernia R. R. Co.*, 47 N. J. L. 44, *Dayton Gold Min. Co. v. Seawell*, 11 Nev. 394, *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147, *Boyd v. Negley*, 40 Pa. St. 377, and *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659, are in all essential particulars similar to the case at bar. They were cases where an existing railroad was endeavoring to condemn a right of way for a railroad that would reach coal or mineral mines and transport the products thereof to the markets, or where a new railroad company organized practically for that purpose was seeking to do the same thing. In *Dietrich*

v. Murdock, 42 Mo. 279, Contra Costa Coal Mines R. R. Co. v. Moss, 23 Cal. 323, Colorado Eastern Ry. Co. v. Union Pacific Ry. Co., 41 Fed. 293, New Central Coal Co. v. George's Creek Coal etc. Co., 37 Md. 537, and Powers v. Hazelton etc. Ry. Co., 33 Ohio St. 429, the same persons owned the coal mines and the railroad, and the railroad was organized principally to transport the products of the coal mines to the market, and precisely the same objections and defenses were made in those cases as are made in this case, yet in each instance the right of eminent domain was sustained and the use declared to be a public use. These precedents are in entire consonance with reason, principle, and the spirit, letter, and policy of the law, and abundantly support the ruling of the trial court in this regard.

Of course, if a railroad company should undertake to condemn land for a purpose that was not within the scope of the powers and purposes legally allowed to railroads, such a proceeding would not only be ultra vires, but would be a taking of land for a private use. But the condemnation of land for the <sup>312</sup> purpose of constructing and operating thereon a railroad, in its very nature and essence, cannot be the taking of land for any other than a public use.

Section 14 of article 12 of our constitution declares: "Railroads heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and railroad companies common carriers. The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads of the state, and shall from time to time pass laws establishing reasonable maximum rates for the transportation of passengers and freight on said railroads and enforce all such laws by adequate penalties." And the general assembly has passed such laws (Rev. Stats. 1899, c. 12, art. 2, sec. 1126 et seq.), and provided for punishing any railroad that refuses to receive freight or passengers (Rev. Stats., sec. 1122), and has required the railroad commissioners to see to the enforcement of the law (Rev. Stats., sec. 1145 et seq.), and has expressly prescribed that mandamus shall lie to enforce the rights so secured, and in addition imposes a fine for a violation of the law (Rev. Stats., sec. 1154).

If the constitution is to be respected, it follows, as surely as the shadow does the sun, that land condemned by a railroad can only be used for a public purpose—is a public highway—and therefore cannot be used for private purposes. The land

so appropriated and used is as much a public highway as a street in a city, so far as the use is concerned, and can no more be employed or used for private uses than a street can be.

This is the purpose and this the use for which the land is sought to be condemned. The right must exist, unless it be true that the length of the road or the volume of business likely to be done at once limits or qualifies or takes away the right <sup>313</sup> or changes the character of the use. Such a contention manifestly disproves itself. But authority is not wanting to show that the courts have always refused to put any such construction upon such provisions in a constitution or in the laws: *Talbot v. Hudson*, 16 Gray, 417; *Colorado Eastern Ry. Co. v. Union Pac. Ry.*, 41 Fed. 293; *Contra Costa Coal Mines R. R. Co. v. Moss*, 23 Cal. 323; *De Camp v. Hannibal R. R. Co.*, 47 N. J. L. 44; *Bloomfield etc. Gas Light Co. v. Richardson*, 63 Barb. 448; *Fanning v. Gilliland*, 37 Or. 369, 82 Am. St. Rep. 758, 61 Pac. 636, 62 Pac. 209; *Hartwell v. Armstrong*, 19 Barb. 166; *Aldridge v. Tusumba etc. Ry. Co.*, 2 Stew. & P. 199, 23 Am. Dec. 307; *Gilmer v. Lime Point*, 18 Cal. 229; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *O'Reiley v. Kankakee etc. Co.*, 32 Ind. 169; *Riche v. Bar Harbor Water Co.*, 22 Alb. L. J. 498; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659; *National Docks Ry. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755; *Chicago etc. Ry. Co. v. Porter*, 43 Minn. 527, 46 N. W. 75; *Ross v. Davis*, 97 Ind. 79; *Lindsay Irr. Co. v. Mehrtens*, 97 Cal. 676, 32 Pac. 802; *Pocantico Waterworks Co. v. Bird*, 130 N. Y. 249, 29 N. E. 246. These cases decide that the principle is the same whether all the people of the state or only all the people of the same locality have a right to demand and receive service from the corporation, then the use or purpose is public and not private.

In *Dietrich v. Murdock*, 42 Mo. 283, this court settled the law on this subject in this state in the following concise and clear annunciation: "The legislature, in the exercise of its discretion in delegating to this company the right of eminent domain, evidently proceeded upon the idea that the public interest was to some extent at least to be subserved by its creation. What the precise degree of its usefulness to the public might be is not, in our view of the case, necessary to be determined. We think the courts of the country ought not to interfere with the exercise of this discretion, except in those cases where it is manifest that private interests alone are to be promoted, and private <sup>314</sup> rights violated to the extent of taking the prop-



erty of one individual and transferring it to another. The sixth section of the act under which this company claimed its corporate existence declares that 'said company shall have the exclusive power to acquire, own, and employ steam power or animal power, locomotives, cars, and carriages necessary for the transportation of passengers, coal, and every description of personal property on said road for themselves and other persons.' Whether the private interests of this company were such as to require the construction of this road, or constituted the main reason for the act of incorporation, with the power conferred by it, is not material. It is enough that, by the terms of the law, it is made a public corporation for the use and benefit of that particular section of the state. The public had a right to demand that the means of transportation, both for passengers and freight, commensurate with its wants, should be provided by the company. Any failure of its duty to the public in this particular, and to transport passengers and freight when offered for that purpose, would have subjected the company to an action for damages. It must be assumed, then, that the grant of authority to the company to condemn the land necessary for a roadbed was a rightful exercise of legislative discretion."

To my mind the principle is axiomatic—a truism—and needs no precedent to prove or support it. It is absolutely incomprehensible to my mind to contend for such a construction in the face of the constitution and laws of this state. If the plaintiff condemns this land, the constitution at once impresses it with a public use. The plaintiff cannot use it for any other purpose. It must serve all people alike or it can be compelled by mandamus to do so and forced if it refuses. The fact that all the people of the state do not need it does not change its character or the use it can legally put the land to. No railroad serves all the people. It can only serve the public living <sup>315</sup> along its line or desiring to travel over it, and if it does this its rights and powers and duties are the same under the constitution and laws of this state, whether it is only ten miles long or is a monster railroad girding the state from one end to another.

2. The defendants contend, however, that there is no necessity for this railroad or this proceeding, because the Kansas and Texas Coal Company has an ample remedy under section 1119 of the Revised Statutes of 1889; that is, that section provides that when any person owns a coal, lead, iron, or zinc mine

located near or within a reasonable distance of any railroad track, and the railroad commissioners are of opinion that the amount of business is sufficient to justify it, such owner may, at his own expense, build and keep in repair a switch leading from the railroad to such mine, and the railroad company is required to furnish the switch-stand and frog and other necessary material for making connection with its track, and to make such connection—the mine owner to pay the actual cost thereof.

It is apparent, however, that this could only be done where the mine owner owns the ground or right of way over which the switch is to run. If he does not own it, he is, of course, not in a position to construct a private switch, for he has no power to condemn a right of way, and cannot demand that the railroad company shall exercise its power of eminent domain to acquire such a right.

This thought evidently came to defendant's counsel when making this claim, for they follow it up by calling attention to sections 9559 and 9560 of the Revised Statutes of 1899, as affording another remedy. That is, those sections provide that if any person owns land lying within twenty miles of a railroad, and has no access to such railroad by any public road running from <sup>316</sup> such lands to such railroad, "convenient for mining, agricultural or commercial purposes," such owner may petition the county court for the establishment of a private road, and the court shall appoint commissioners to assess the damages to the owners of the lands through which such private road will pass, and the proceedings shall be the same as provided for the establishment of a private road (Rev. Stats. 1899, sec. 9459 et seq., the petitioner to pay the damages), but such owner may construct and use on such private road a tramway for the purpose of hauling and carrying coal and other products to such railroad, and such road shall not be less than twenty nor more than forty feet wide.

In other words, the contention amounts to this: That the Texas and Kansas Coal Company, a business corporation, without the power of eminent domain, may in this way have the county court condemn a private road, not less than twenty nor more than forty feet wide, and that company may construct thereon a tramway for hauling its coal to the railroad, and in this way other persons' land or even defendant's land may be condemned for a use which it is claimed is a private, and not

a public, use, but the plaintiff railroad cannot condemn this land.

Even if all this be true, it is no defense to this action. Neither of the remedies afforded by these provisions of the statutes is exclusive, nor do they supersede or take away the right of eminent domain possessed by the plaintiff. It may also be doubted if the last-named remedies would be adequate even for the transportation of the volume of coal now being produced. Seven hundred tons of coal a day may possibly be moved over such a tramway along a private road, but it would be rather an obsolete method of hauling that much freight every day in the year, and might have a tendency to increase the <sup>317</sup> price of coal to the consumer. A wagon train of sufficient number might haul seven hundred tons of coal a day, but it would scarcely be deemed an up-to-date method of transporting that much freight. A tramway is better than a wagon train, but is as much inferior to a railroad train as it is superior to a wagon train for such purposes.

3. The defendants further claim that there is no necessity for locating the plaintiff's railroad at the proposed place, and that it could just as easily be located somewhere else (as, for instance, on the one hundred foot strip to the east of this property which is owned by the Kansas and Texas Coal Company), where it would not interfere with the defendant's road or its business.

The answer to this is obvious: the railroad company has the right of eminent domain; it is given the privilege by the legislature to select the location it prefers upon paying therefor, and therefore the courts have no right to deny the exercise of the power vested in the company either absolutely or because the court may think some other location is as good or better.

In speaking on this subject, Lewis on Eminent Domain, volume 1, section 286, says: "This is a matter which rests wholly with the legislature. The legislature may designate particular property to be taken, or this may be left to the discretion of those upon whom the authority is conferred, with or without limitations. In the absence of any statutory provision the particular route to be followed between designated points in case of a railroad or similar way rests in the discretion of the company."

This question, however, was set at rest in this state in the case of St. Louis etc. Ry. Co. v. Hannibal Union Depot Co., 125 Mo. 93, 94, 28 S. W. 483, where Macfarlane, J., said: <sup>318</sup>



"But it is said that there is no such necessity for the appropriation of a part of defendant's property as justifies the exercise of the power of eminent domain. The use of land for railroad tracks has ever been regarded as a public use. Counsel does not question this proposition, but insists that defendant's property ought to be exempt if plaintiff has other routes over the lands of other proprietors which could be used in reaching the terminus of the road. In other words, that defendant's property, being already devoted to one public use, cannot be taken unless the necessity is so absolute that without it the grant itself would be defeated. That the necessity must be beyond plaintiff's control, and not one created by itself for its own convenience or for the sake of economy.

"It is undoubtedly true that 'the right of eminent domain rests upon necessity and that alone. Beyond this there is no right': Pennsylvania R. R. Co.'s Appeal, 93 Pa. St. 150. But it is also true that the sovereignty must be the judge of the necessity of taking the property, and the legislature has delegated to railroad corporations the right to exercise the power, and the courts of this state have always held the use of land by a railroad to be for a public use. The sovereignty has lodged with railroad companies the power of selecting and adopting their own routes, subject only to such limitations as have been imposed. Whenever the use of private property on the line adopted is necessary, the necessity exists. There is no distinction in this respect between private and corporate property, except when the exercise of the power as to the latter should 'materially interfere with the uses to which, by law, the corporation holding the same is authorized' to apply it."

The defendant is in error in saying the plaintiff owns a right of way one hundred feet wide lying just east of the land sought to be condemned. The plaintiff does not own any such land. The Kansas and Texas Coal Company owns a strip of <sup>319</sup> land one hundred feet wide, which lies east of the defendant coal company's land, and by refusing to recognize the separate identities of the plaintiff and the Kansas and Texas Coal Company, and treating the latter as the owner of the plaintiff, the defendants base their claim that the plaintiff owns the hundred-foot strip. This contention is without legal foundation. The Kansas and Texas Coal Company would have the same right to object to the condemnation of its land that the defendants have to object to the condemnation of their land. If the contention were well founded the result would be that the

plaintiff could not condemn any land, for every other land owner would likewise have the same right to object to his land being condemned; yet in McGrew's case the right of condemnation was held to exist, and McGrew's land was taken notwithstanding it was used as a coal mine.

4. The defendants next insist, and the trial court decided, that this plaintiff cannot condemn this land, because the use of the land by plaintiff for a railroad track would materially interfere with the use of the land to which by law the defendant coal company is authorized to put the line.

This contention and decision is based upon a construction put upon section 2741 of the Revised Statutes of 1899: Rev. Stats. 1899, sec. 1272. That section is as follows: "In case the lands sought to be appropriated are held by any corporation, the right to appropriate the same by a railroad, telephone, or telegraph company shall be limited to such use as shall not materially interfere with the uses to which, by law, the corporation holding the same is authorized to put said lines," etc.

The plaintiff contends: 1. That this statute only applies to any corporation that possesses the power of eminent domain, <sup>320</sup> and has already applied the land to a public use, and that it does not apply to land owned by a business corporation, organized for private gain, and that performs no public function and renders no public service, and that the defendant coal company is not within this class; and 2. That if this is not so, then the section is void because in conflict with section 4 of article 12 of the constitution, which provides that "the exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking by the general assembly of property and franchises of incorporated companies already organized, or that may be hereafter organized, and subjecting them to the public use, the same as that of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when in the exercise of said right of eminent domain any incorporated company shall be interested either for or against the exercise of said right"; and 3. That the proposed use of the land by the plaintiff company will not materially interfere with the use thereof by the defendant coal company.

Section 2741 of the Revised Statutes of 1889 first appeared in the statutes of this state as section 8 of chapter 66 of the General Statutes of 1865, and has been continued in the revisions in the same words ever since, except that the word "tele-

phone" has been inserted between the words "railroad" and "telegraph."

This section 2741 of the Revised Statutes of 1889 follows section 2740 of the Revised Statutes of 1889, which provides: "No telephone or telegraph company shall, by virtue of this article, be authorized to enter or appropriate any dwelling, barn, store, warehouse, or similar building, erected for any agricultural, commercial or manufacturing purposes, or to erect poles so near thereto as materially to inconvenience the owner in their use or to occasion any injury thereto," and this section was section 7 of article 66 of the General Statutes of 1865, except that the word <sup>321</sup> "telephone" has been added.

It has been decided in this and other jurisdictions, and is the accepted law, that the fact that land sought to be condemned for a public use is held, owned, and used by a corporation organized for private gain is no defense to the right of condemnation: *Twelfth St. Market Co. v. Philadelphia etc. R. R. Co.*, 142 Pa. St. 580, 21 Atl. 902, 989; *Lewis on Eminent Domain*, sec. 274, and cases cited.

The same principle is declared even where the property sought to be condemned is held and used by a corporation possessing the power of eminent domain, and is using the same for a public purpose: *St. Louis etc. Ry. Co. v. Hannibal Union Depot Co.*, 125 Mo. 82, 28 S. W. 483; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S. W. 943; *Kansas City etc. Belt R. R. Co. v. Kansas City etc. R. R. Co.*, 118 Mo. 599, 24 S. W. 478; *Lewis on Eminent Domain*, sec. 274, and cases cited. The only qualification to this rule is that such property cannot be taken from one corporation by another corporation, to be used for the same purpose in the same manner that it was used by the corporation that first appropriated it to such use and purpose: *Lewis on Eminent Domain*, sec. 276. In other words, every corporation holds property subject to the right of the state to take it for another public use, whenever, in the discretion of the legislature, the exigencies require its use for such other purpose, and this is true even as to the franchise itself of any corporation: *Twelfth St. Market Co. v. Philadelphia etc. R. R. Co.*, 142 Pa. St. 589, 21 Atl. 902, 989; *The Sunderland Bridge*, 122 Mass. 459; *In re Opinion of the Justices*, 66 N. H. 629, 33 Atl. 1076; *New York Cent. etc. Ry. Co. v. Metropolitan Gas Light Co.*, 63 N. Y. 326; *In re Bellona Co.*, 3 Bland, 442; *Enfield Toll Bridge Co. v. Hartford etc. R. R. Co.*, 17 Conn. 40,



42 Am. Dec. 716; Boston etc. Corp. v. Salem etc. Ry. Co., 2 Gray, 1.

This is what is meant by section 4 of article 12 of the constitution, which declares that the exercise of the power and <sup>322</sup> right of eminent domain shall never be so construed or abridged as to prevent the taking by the general assembly of the property and franchises of any incorporated company, already or hereafter organized, and subjecting them to public use the same as that of individuals.

In Chicago etc. Ry. Co. v. McGrew, 104 Mo. 282, 15 S. W. 931, it was held that the property of an individual coal miner might be taken for railroad purposes. In Chicago etc. Ry. Co. v. Wolf, 137 Ill. 365, 27 N. E. 78, the property of a coal mining company was held subject to condemnation for railroad purposes, notwithstanding the construction of the railroad would destroy a tramway that extended from the shaft of the mine to the tracks of another railroad. In St. Louis etc. Ry. Co. v. Hannibal Union Depot Co., 125 Mo. 92, 28 S. W. 483, the property of a corporation used for a union depot was held subject to condemnation for railroad purposes. In Twelfth St. Market Co. v. Philadelphia etc. R. R. Co., 142 Pa. St. 542, 21 Atl. 902, 989, the property of a corporation used as a public market was held subject to condemnation for railroad purposes.

In the light of this constitutional provision and of these adjudications in this and even in other states that have no such constitutional reservation, it cannot be said that the legislature intended by section 2741 to say, or had the constitutional right to say, that property held by any corporation, public or private, possessing or not possessing the power of eminent domain, should not be subject to condemnation for another or superior public use. That section is a simple legislative declaration that the use of the land for railroad purposes is not a superior use to the use of the land by the company that owns it and has already devoted it to one use authorized by law.

It goes without saying that one railroad company could not condemn the right of way of another railroad company and use it for the same purpose as the first company was using it. But the state has the power to condemn and take away not only <sup>323</sup> the right of way of a railroad company, but also its franchises.

Applying these principles to the case at bar, we find that the defendant company's charter does not authorize it to hold

or use land for railroad purposes, but that it is only authorized to buy, sell, and operate coal lands and coal mines, to buy and sell merchandise, and to own and operate electric light and power plants, and to sell electric light and power. The power to build and operate a railroad is not expressly conferred, nor is it necessarily implied in the powers conferred. So, while the defendant coal company can own and use lands for mining coal, that is the full extent of the use which its charter gives it to make of this land. And if it be true, as was decided in *Chicago etc. Ry. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931, that the property of an individual miner used for mining coal can be condemned for railroad purposes, then it follows that under section 4 of article 12 of the constitution the property of any incorporated company used for the purpose of mining coal is likewise subject to condemnation, and this and all courts are expressly prohibited by that section of the constitution from construing the property of an incorporated company exempt from condemnation when the property, if held by an individual, would be subject to condemnation.

The legislature, therefore, has not said by section 2741 that property held as this property is held shall be exempt from condemnation, and if the legislature had said so it would be an unconstitutional act, because it did not make property held and used in like manner by an individual also exempt from condemnation.

It is within the province of the legislature to exempt any kind of property from the power of eminent domain delegated by the state to a corporation, and section 2740 does exempt dwelling-houses, etc., from being taken or used by telegraph or telephone companies, but under the constitution it is beyond the <sup>324</sup> power of the legislature to exempt any class of property from condemnation if it is owned by any kind of an incorporated company, and to make it subject to condemnation if it is owned by an individual.

5. The circuit court, however, assumed that section 2741 was a valid enactment, and held that the condemnation of this land by the plaintiff for railroad purposes would materially interfere with the use to which the defendant was authorized by law to apply it.

It has already been pointed out that the defendant coal company has no power under its charter to construct, operate, or maintain a railroad, and hence it is not authorized to use any part of the land for railroad purposes.

But aside from this, the facts are simply these: The center of the defendant's track will be fourteen feet from the center of the plaintiff's track. The defendant's testimony shows that tracks thirteen feet from center to center is a safe construction. The evidence further shows that the New York Central and Pennsylvania roads have parallel tracks, whose centers are only twelve feet and twelve feet and two inches apart. Assuming that the cars are nine feet in width, a car on one road would extend four and a half feet toward the cars on the other road; so the two would occupy nine feet of the fourteen feet space between the centers of the two tracks. This would leave a space of five feet between passing cars. It needs nothing but common sense to determine that as cars must run on fixed rails there can be no danger in running cars on separate tracks, when they cannot get closer than five feet to each other. It is too plain to admit of debate that the plaintiff's railroad, so constructed, could not interfere in any manner with the <sup>325</sup> operation of the defendant's railroad.

The plaintiff's railroad could not interfere with the operation of the mine, for the shaft to the mine (which is operated by the Kansas and Texas Coal Company and not by the defendant coal company) is from fifty-six to seventy-two feet west of the west line of the strip sought to be condemned and where the plaintiff's railroad will run. The switch or loading tracks used by the defendant company are located on this strip of fifty-six to seventy-two feet of land, and are all between the main track of the defendant company and the shaft to the mine. So that it cannot be said that the construction of the plaintiff's road will in any manner whatever interfere with the operation of the mine or the use to which the defendant has applied or is authorized to apply the land. But even if it did so interfere, the McGrew case, *supra*, is ample authority for holding that the land is not exempt from condemnation for railroad purposes.

The defendants evidently realize that this is true, for they seek to strengthen their case by showing that they contemplate opening a new mine south of the Watson mine, and had already surveyed and located a track to such new mine, which will leave the track running to mine No. 7 and run to the Watson mine, and that it will need the land here sought to be condemned to use for such new track.

Courts must deal in cases like this with the conditions that exist at the time the condemnation is asked, and cannot take



into account conditions that may or may not arise or be created thereafter: *Butte etc. Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232; *Colorado Eastern Ry. Co. v. Union Pac. Ry. Co.*, 41 Fed. 293.

It furthermore appears from the record herein that the defendant company on the 21st of February, 1899, proposed to the plaintiff company to accept three thousand dollars <sup>326</sup> for the right of way here sought to be condemned, with an agreement as to crossings and protection to defendant's road where the grade of the plaintiff's road is below that of defendant's road. The plaintiff offered three hundred dollars, and refused to pay three thousand.

Manifestly, it cannot be true that the location and operation of the plaintiff's railroad upon this land would materially interfere with the present or future use of the land for mining purposes, or with the operation of the defendant's railroad, much less that it would practically destroy defendant's business and road, if the defendant was willing to sell this identical land to the plaintiff for a railroad right of way for three thousand dollars. The real dispute between the plaintiff and defendants, therefore, is the difference between three thousand dollars, the price the defendants offer to take, and three hundred dollars, the price the plaintiff offers to give, for the property in question to be used for a railroad right of way.

It follows from what has been said that the circuit court erred in refusing to appoint commissioners to assess the damages for the taking of the land for railroad purposes, and in entering judgment for the defendants, and therefore the judgment of the circuit court is reversed and the cause remanded, with directions to appoint such commissioners and to proceed in accordance herewith.

Sherwood, Robinson, and Brace, JJ., concur.

VALLIANT, J., with whom concurred Burgess, C. J., and Gantt, J., dissented. These judges looked behind the nominal character of the plaintiff as a railroad company, and found the controversy to be one between two rival coal companies, wherein one, having assumed the legal garb of a railroad corporation, was endeavoring to shut out its rival from the market and reduce it to a dependency. They find the proof to be that the plaintiff's demand is for a wanton destruction of the defendant's business, and that the plaintiff, being really the Kansas and Texas Coal Company already has an available right of way. The plaintiff's charter is not conclusive,

for "when a suitor comes into court and asks its aid, the court has a right to know in what character it comes, real or fictitious." And the judge adds: "If it has ever been decided that a coal company could take on itself the character of a railroad company for its own private use and exercise the right of eminent domain for the sole purpose of closing out its rival in business, and preventing another coal mining company from bringing its product to market, and that the courts were bound to assist it in that purpose, I have not seen such decision." The dissent holds that section 1350 of the Revised Statutes of 1899 applies to the present situation. This section provides that the right to condemn "shall be limited to such use as shall not materially interfere with the uses to which by law the corporation holding the same is authorized to put said property," and was deemed not to conflict with article 12, section 4, of the constitution, since this section did not mean that the property of a corporation already applied to a public use could be taken by another corporation for the purpose of applying to the same or another public use, if the public use it was already serving would thereby be impaired or destroyed. The dissenting judges held that because the defendant already operated a railroad of its own over the land which plaintiff wished to condemn, the land was devoted to a public use, and could not be condemned for railroad purpose by the plaintiff, although the defendant possessed no power of eminent domain. In commenting on this, the dissenting opinion says:

"Now, it is argued in this case that although the defendant corporation owns and operates a railroad, yet as it is not chartered as a railroad corporation its railroad is not devoted to a public use, whereas the plaintiff being so chartered, its use is a public use. But we have seen that the actual use, past, present, and prospective, to which the railroads of each corporation is devoted, is exactly the same. The fact is the same in each instance. If a difference exists it is only in theory, and that theory purely fictitious. We are asked to say that it is lawful for the plaintiff to condemn the defendant's property on the theory that in defendant's hands it is being devoted to private use, yet when condemned it is in plaintiff's hand to be in fact devoted to exactly the same character of use; that the charter makes one private and the other public, though they are in fact the same.

"If there is any force in the decisions referred to, which hold that a railroad designed and used exclusively to bring to market the product of a coal mine is in public service, they establish the fact that the use to which the defendant is devoting the forty foot strip in question is a public use, and that being so the plaintiff, even if it be a railroad corporation, is, by the terms of the statute quoted, forbidden to impair the defendant's use of the same."

**Eminent Domain—Public Use.**—If a railway is constructed for the general public, it must be regarded as a public use, though there are no towns at its termini, and its route is through a rough, sparsely settled country, and its use has been in transporting logs from the lands of the corporation to its sawmills: *Bridal Veil Lumbering Co. v. Johnson*, 30 Or. 205, 60 Am. St. Rep. 818, 46 Pac. 790. A railroad built by a private corporation, with its main line and branches run with convenient contiguity to private mines or ore-houses, is impressed with a public use, and may exercise the right of eminent domain, when the ground taken is necessary to such use, and when, if the ground is already taken, the public use to which it is to be applied is a more necessary public use: *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232. If a use is public, the fact that not many persons will enjoy it is not material: *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232; *Fanning v. Gilliland*, 37 Or. 369, 82 Am. St. Rep. 758, 61 Pac. 636, 62 Pac. 209.

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### SMOOT v. JUDD.

[161 Mo. 673, 61 S. W. 851.]

**CONTRACT—LEX LOCI.**—The law of the place where a contract is to be performed is the law of the contract.

**MARRIED WOMAN—SUIT ON INVALID NOTE—WAIVER OF DEFENSE.**—If a married woman is sued upon a contract which she had no power to make, but this does not appear from the complaint, and she fails to interpose such defense, a judgment against her is valid, since the defense is extinguished in the judgment and cannot afterward be set up against it.

**MARRIED WOMEN—RELIEF FROM JUDGMENT—FAILURE TO SERVE WITH PROCESS.**—A COURT OF EQUITY will enjoin the enforcement of a judgment against a married woman, obtained in an action to which she had a meritorious defense, but which she was prevented from interposing by reason of the fact that she was not served with process and had no knowledge of the pendency of the suit.

**SHERIFF'S RETURN—AMENDMENT.**—In a suit to set aside a judgment founded on a false return, the court has no right to allow the sheriff to amend his return in the original case.

**SHERIFF'S RETURN—CONCLUSIVENESS.**—The rule that a sheriff's return is conclusive as between the parties to the suit has no application in a suit in equity to set aside the judgment founded on the return on the equitable ground of fraud, accident, or mistake.

**SHERIFF'S RETURN—FALSE—REMEDY.**—The fact that by reason of a false return one has a remedy at law by suit on the sheriff's bond does not deprive him of his remedy in equity to vacate the judgment obtained by means of such false return.

**FALSE RETURN—VACATING JUDGMENT.**—A judgment by default rendered on a false return will be set aside or its execution enjoined by a court of equity.



**RES JUDICATA — PARTITION — STRIKING OUT ANSWER.**—Where, in a partition suit, the answer of a defendant, who claims title to the property, is stricken out on the ground that the question of title could not be tried in the case, and that any interest he might have could not be affected by the decree, the decree rendered is not *res judicata* as to such claim of title.

**PARTITION SALE—TITLE ACQUIRED BY PURCHASERS.**—The purchasers at a sheriff's sale under a decree in a partition suit acquire only the title which the parties to the suit had.

Willis H. Leavitt, for the appellant.

Thurman, Wray & Timmonds, for the respondents.

**680 VALLIANT, J.** This is a suit in equity to set aside a judgment rendered against plaintiff, a sheriff's deed to her undivided interest in certain land sold under execution of the judgment, and two sheriff's deeds to the same land in a partition proceeding brought by the grantee in the first deed against the parties owning the other undivided interest in the land. The person in whose favor the judgment was rendered, and who was also the purchaser at the execution sale, and the purchasers at the partition sale, are parties defendant.

The facts of the case are: In 1887 the plaintiff was a married woman, living with her husband in Barton county. She owned some real estate in Jasper county, which was all the property she had. On April 15, 1887, she executed, jointly with her husband, a promissory <sup>681</sup> note for six hundred and eighty-three dollars and sixty-one cents, payable one day after date, to defendant Judd, and a mortgage on the Jasper county land to secure it. The note on its face mentions the mortgage and the land mortgaged. This note was given for money advanced by Judd to plaintiff's husband. She was at the time she signed the note and mortgage in Kentucky, on a visit, and her husband was at their home in Missouri, where he signed the papers. Judd lives in Kentucky, and is a lawyer. The mortgage was afterward released by Judd, who seems to have been very friendly and indulgent to plaintiff and her husband. But in July, 1891, the note was not paid, nor the interest, and the mortgaged property, or rather the property that had been mortgaged but released, had been sold by the plaintiff and her husband. Judd placed the note in attorneys' hands for suit, and suit was brought on it against plaintiff and her husband to the September term, 1891, of the Barton circuit court. The petition in that case did not describe the defendants as husband and wife, and there was nothing on the face of the petition or note to show that the plaintiff was a married woman,

neither was there any such information in the sheriff's return. The return was personal service on both defendants. There was no answer filed, and accordingly, at the September term, the court rendered final judgment by default against both defendants for the amount of the note and interest, nine hundred and twenty-five dollars and thirteen cents, and costs. Afterward, a brother of plaintiff died intestate, leaving certain real estate in Barton county, and leaving as his heirs at law a brother and three sisters, of whom the plaintiff was one. Execution issued on the above-mentioned judgment, and under it the sheriff sold the undivided interest of the plaintiff in that land on March 10, 1892, and the judgment creditor, Judd, became the purchaser and received the sheriff's deed accordingly. That is one of the deeds sought to be canceled.

In October, 1893, Judd brought suit against the other heirs <sup>682</sup> of plaintiff's deceased brother for partition of the land, alleging that by purchase he had become the owner of the undivided interest of the plaintiff, Mrs. Smoot. Plaintiff in this suit filed a motion in that suit, stating that she owned an interest in the property sought to be divided, and asking to be made a party, but her motion was overruled. But it seems she did file an answer, said to be by leave, but on motion of the plaintiff in that suit, Judd, her answer was stricken out.

The grounds of that motion were: "Because Ella G. Smoot has no right or authority in law to be made a party defendant in this suit.

"Because said answer seeks to try the title to a tract of land described in plaintiff's petition and sought to be partitioned.

"Because said Ella G. Smoot has ample remedy, and is fully protected, if any rights she has which will not be affected by the proceedings in this case."

There was a decree for the sale of the land for partition, and it was sold accordingly, and the defendants Amos Brand and William Jackson became the purchasers in several parts, and received the sheriff's deeds for the parts they respectively purchased. Those deeds are also assailed in this suit.

The evidence showed that the sheriff's return on the summons in the suit on the note was false in reference to the plaintiff in this case, Mrs. Smoot; she was not served personally as in the return stated. The court suffered the sheriff to testify that when he called to serve the writ Mrs. Smoot was quite sick in bed, and for that reason he did not intrude, but served

the writ on her husband, who was codefendant, and left a copy of the writ with him for his wife, and upon that evidence the court allowed the sheriff then to amend the return. There was some effort to show that she had actual knowledge that the suit was pending, but the proof in that direction was not very positive. <sup>683</sup> One of the attorneys for Judd testified that he called on plaintiff and her husband about the note before suit was brought to try to collect it, and gave them to understand that suit would be brought if it was not satisfactorily arranged, but that he had no further conversation with her until after the judgment had been rendered, when there was some negotiation between them looking to a sale of the land and a purchase by Judd with time allowed to redeem; that negotiation resulted in nothing. He said that in that negotiation they had an attorney's advice; that attorney was called by defendants, and over plaintiff's objection that if he was, as he claimed to have been, plaintiff's attorney, he was incompetent to testify as to what his client said, the court allowed him to testify.

He said: "I remember having had a conversation with you [defendant's attorney] in regard to the Judd suit, and I remember distinctly that what the Smoots wanted in that case was that I delay the Downing suit and the Judd suit until they could make a turn in their affairs, to make time to pay the money; that is all they wanted as far as the representation they made to me; the fact is as to the Judd suit, Mr. and Mrs. Smoot, when they talked to me about it, said that Mr. Judd had treated them very kindly and they did not want to fight the suit, and simply wanted time in which to meet the obligation."

"Cross-examined: Q. Were you employed by Mr. Smoot to look after his interest in this Judd suit? A. I was employed in and about this suit; yes. . . .

"Q. Were you employed by Mr. Smoot to look after this suit? A. In the way he wanted it looked after, I was.

"Q. You were employed by him? A. Yes, sir.

"Q. Did you let that suit go by default? A. Yes, sir.

"Q. Why? A. They wanted no expenses made on the agreement that Mr. Judd was to give them time to pay off the note.

"Q. When was that? A. I do not think I <sup>684</sup> talked to Mrs. Smoot prior to the time judgment was rendered, but after the judgment was rendered I talked to her. . . .

"Q. Mrs. Smoot did not employ you to look after that Judd matter, you did not have specific employment to look after



that Judd matter in behalf of Mrs. Smoot? A. As I stated originally, Mr. Smoot talked to me about the matter, but I do not remember that I had any talk with Mrs. Smoot about it until after the judgment was rendered; took it for granted that it interested them both, she was his wife; whatever he did was all right."

It was not disputed that after the judgment was rendered this attorney was consulted by Mrs. Smoot in relation to the administration of her deceased brother's estate. She testified positively that she never spoke to him about the Judd suit, and knew nothing herself about it, nor that a judgment had been rendered, until, in looking after her interests in her brother's estate, she found that it had been sold.

The foregoing are substantially the facts in the case. The chancellor found the issues for the defendants and dismissed the plaintiff's bill, from which decree she appeals.

1. The case was tried on the theory that the note was a Missouri contract, and subject to our laws, and that was probably correct, although it was signed by Mrs. Smoot in Kentucky, mailed to her husband here, who signed it and returned it to Kentucky, where it was delivered to the payee, who was a resident of that state. No place of payment is mentioned in the note, but as the makers lived here and, so far as the married woman's obligation is concerned, the property charged with its payment being in Missouri, this may be considered as the place intended for the performance of the contract. The law of the place where the contract is to be performed is the law of the contract.

That point, however, is not very material in this case, because <sup>685</sup> in 1887 the common-law disability of a married woman to incur a general personal liability by making a promissory note was the law in this state, and if there was a statute in Kentucky removing such disability it has not been pleaded or proven.

It is conceded by the counsel on both sides that at the date of the note in question—1887—a married woman could not by such an instrument incur the liability of a debt for which a judgment in personam could be rendered against her, to be satisfied generally of her goods and chattels, lands, and tenements. But the contention for the defendants is that in 1891, when suit was brought on the note, she had been, by section 6864 of the Revised Statutes of 1889, reduced to the condition of "a feme sole so far as to enable her to carry on and transact

business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue or be sued at law or in equity, with or without her husband being joined as a party," and that therefore when the court at that date rendered judgment against her the judgment was valid.

If a person *sui juris* is sued and brought regularly into court by process to answer a petition that states on its face a good cause of action, though he may have a good defense, yet if he omits to plead it, or if he pleads it, yet fails to sustain it by proof, and the judgment goes against him, his defense is extinguished in the judgment and cannot afterward be set up against it. And to that condition modern legislation has brought married women.

If the petition in the case of *Judd v. Smoot* had stated upon its face that the defendants were husband and wife when the note was signed, it would not have stated a cause of action against the wife, because it would have shown that at <sup>1886</sup> that date she was incapable of making a note. But the petition omitted that statement, and the court had no right to presume that either defendant was non *sui juris*. But if Mrs. Smoot was in court by process, the duty devolved upon her to plead that fact and that would have been a complete defense to the suit. She was then (assuming that she had been duly served with process) as responsible for her acts in relation to that suit as her husband was for his own acts; she could make her defense good if she chose to do so, or she could waive it and let judgment go against her, and if she waived it and let the judgment go, she could not afterward complain.

The numerous cases cited in the briefs of counsel to show that a judgment in personam against a married woman upon a money obligation is void are cases that arose when the law recognized that a married woman's highest duties were those that pertained to her as wife and mother, and when it did not expect of her that close attention to affairs of business that is expected of others, and when it drew over her its shield of protection. But that particular protection is now withdrawn, and she must take care of her own business affairs. In the suit of *Judd v. Smoot* the petition stated a cause of action, the sheriff's return showed that the process had been served upon both defendants in person, and therefore it appeared from the record that the court had jurisdiction both of the subject of

the suit and the persons. The judgment on the face of the record is entirely valid, and cannot be assailed collaterally; that is, it cannot be now questioned on the ground merely that a fact existed which might have been interposed as a valid defense but was not.

But this is not a collateral attack, nor is it an attempt merely to plead now a defense which she had the opportunity to plead then, but which opportunity she neglected. This is a direct assault in a court of equity upon the judgment. There <sup>687</sup> is no necessity for reviewing now the authorities on this branch of equity jurisdiction. This court has recently discussed the subject with the aid of the authorities in *Wonderly v. Lafayette Co.*, 150 Mo. 635, 73 Am. St. Rep. 474, 51 S. W. 745. The doctrine is thus stated by an able law-writer: "The power and jurisdiction of courts of equity to enjoin a party from enforcing a judgment which has been obtained, when it would be against conscience to permit him to do so, is at the present day so firmly established, so salutary in its operation, and so thoroughly in accord with the promptings of justice, that it is difficult to realize the stubbornness and bitter jealousy with which the beginnings of its exercise were resisted": 1 Black on Judgments, sec. 356. Another eminent text-writer has said: "Where the defendant in an action at law has a good defense on the merits, which he is prevented by accident from setting up or making available, without any negligence or inattention on his part, and a judgment is rendered against him, equity will exercise its jurisdiction on his behalf by enjoining further proceedings to enforce the judgment, or by setting it aside so that a trial may be had on its merits": 2 Pomeroy's Equity Jurisprudence, sec. 836. And what is there said of accident is repeated by the same author concerning mistake and fraud: 2 Pomeroy's Equity Jurisprudence, secs. 871, 919. The author also gives definitions of the terms "accident" and "mistake" as affecting equity jurisdiction in sections 823 and 839.

When the law-books speak of a defense on the merits it means legal merits—merits that the law recognizes and gives effect to. That Mrs. Smoot had such a defense to that suit is conceded; that that defense was known at the time to the plaintiff in that case is conceded; that she was not in fact served with process in the case and did not know that the suit was pending is clearly shown by the evidence. She had, therefore, no opportunity to make her defense. Nor was the plaintiff <sup>688</sup> in that suit, Judd, entirely without fault in the matter.



He knew that she was a married woman and was not legally bound on the note, yet he omitted to state in his petition that the defendants were husband and wife. It cannot be said of that omission that it was fraudulent, because when the plaintiff filed his petition he caused summons to issue to bring in the defendants, and he had a right to presume that Mrs. Smoot would be summoned in the regular way, and that when she should be brought into court she could plead the fact if she chose and that would end it. But that omission is a fact which conspired with other facts to deprive her of her defense without any neglect on her part. A court of equity interposes in such matters when wrong has been done through accident or mistake as readily as when there has been fraud.

When the fact was proven beyond controversy that the sheriff's return on the summons was false, the court allowed him, over plaintiff's objection, to testify that he gave a copy of the writ to plaintiff's husband for her. The court in the trial of this case had no right to allow the sheriff to amend his return in that case. The only issue in this case on the point of the sheriff's return was in relation to the return as it was when the judgment by default was rendered. That return she averred was false, and issue was joined on that averment. Her proof was addressed to that issue and it sustained her averment beyond controversy. If she had been informed that, in case she succeeded in showing that the return in issue was false, the defendants would be allowed to spring another return on her and give her a new issue to try, she might have been prepared for that also. But she was not required to make such preparation nor to anticipate such an issue. The defendants strove to maintain the return as it was; when the plaintiff offered her evidence to disprove it, they objected on the ground that the return was conclusive, and it was not until 689 the falsity was proven that an attempt to set up another return was made. The sheriff was defendant's witness, but he could give no explanation or excuse for the falsity of the return. He said: "I do not know what made me make the return as I did."

There was some attempt to show that the plaintiff had actual knowledge of the pendency of the suit. But the defendant's evidence on that point went scarcely further than tending to show that she knew the note was in the hands of attorneys and that suit was threatened. Against her own positive testimony

that she had no knowledge of the suit until after the judgment had been rendered there is scarcely any evidence at all.

Even the attorney who claimed to represent her (and whose testimony was clearly incompetent), whilst he testified in chief as to what "the Smoots" wanted "as far as the representation they made to me," yet on cross-examination he said that it was Mr. Smoot who spoke to him, and that he did not see Mrs. Smoot until after the judgment was rendered. Her testimony was that she knew nothing of it until her interest in the land had been sold.

There are numerous decisions in this state in which it is held that the sheriff's return on the writ is conclusive as between the parties to the suit: *Heath v. Missouri etc. Ry. Co.*, 83 Mo. 617; *Decker v. Armstrong*, 87 Mo. 316; *State v. Finn*, 100 Mo. 429, 13 S. W. 712. But that well-established principle of law has no application in a suit in equity to set aside the judgment founded on the return on the equitable ground of fraud, accident or mistake. The fact that Mrs. Smoot might have a remedy at law by suit on the sheriff's bond does not deprive her of her remedy in equity to vacate the judgment obtained by means of the false return. The remedy at law which will defeat <sup>690</sup> a suit in equity is a remedy on the same cause of action against the same defendants: *Thorn & Hunkins Co. v. Citizens' Bank*, 158 Mo. 272, 59 S. W. 109, and authorities there cited.

It has been frequently held in other states that a judgment by default rendered on a false return will be set aside or its execution enjoined in a court of equity: *Crafts v. Dexter*, 8 Ala. 767, 42 Am. Dec. 666; *Rice v. Tobias*, 89 Ala. 214, 7 South. 765; *Bell v. Williams*, 1 Head, 229; *Ridgeway v. Bank of Tennessee*, 11 Humph. 523; *McNeill v. Edie*, 24 Kan. 108; *Ryan v. Boyd*, 33 Ark. 778; *Blakeslee v. Murphy*, 44 Conn. 188; *Great Western Min. Co. v. Woodmas etc. Min. Co.*, 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771; *Hickey v. Stone*, 60 Ill. 453. Indeed, it would be so contrary to right and justice to allow a judgment obtained by such means to stand that it is strange there could be any question of the power and duty of a court of conscience in the premises.

The constitution of Missouri ordains that "no person shall be deprived of life, liberty, or property without due process of law." A more flagrant violation of this constitutional provision cannot be conceived than to take one's property by means of a false return of the process. But the root of equity

jurisdiction in such cases is planted deeper than in even a written constitution; it is planted in that enlightened sense of right and justice that lies at the foundation of all our laws and finds chief expression in a court of equity.

Mrs. Smoot had a good defense to that suit, and the plaintiff there knew it, and by means of a false return judgment by default was rendered against her; thus, without fault on her part she was afforded no opportunity to interpose her defense. Such a judgment cannot be suffered to stand in a court of equity.

2. Execution issued on the judgment, and under it the sheriff sold Mrs. Smoot's undivided interest in the land she inherited from her brother, and at the sale the plaintiff in the execution, Judd, became the purchaser. Then he instituted proceedings for partition against the other heirs. Mrs. Smoot petitioned the court to be made a party to the proceeding, but her petition was denied. She filed an answer, however, in which she denied that Judd had acquired title to her interest, and sought to raise an issue as to plaintiff's title, but on motion of the plaintiff in that suit her answer was stricken out, and the cause proceeded to final decree under which the property was sold for partition, and the defendants Brand and Jackson became the purchasers at the sale. Now, it is insisted that the decree in that case is conclusive against the title asserted by Mrs. Smoot here, that what was there adjudged is as to her *res adjudicata*.

The court refused to admit her as a party, and struck out her answer upon the ground that the question of title could not be tried in that case, and that any interest she might have in the land could not be affected by the decree and proceedings there. Those were the grounds asserted by the plaintiff in that case in his motion to strike out, and that is what the court decided. That ruling was *res adjudicata* of that point, and it was the only thing decided in that case that was *res adjudicata* as to Mrs. Smoot. As to the dispute between Mrs. Smoot and the plaintiff in that case in reference to her claim of title, there was no decision. There is nothing in that proceeding that impairs the rights she asserts here.

3. The purchasers at the sheriff's sale under the decree in the partition suit acquired the title that the parties to that suit had nothing more: Rev. Stats. 1889, sec. 7089, now Rev. Stats. 1899, sec. 4353; *Pentz v. Kuester*, 41 Mo. 447; *Cashion v. Faina*, 47 Mo. 133; *Stephens v. Ellis*, 65 Mo. 456; *Hart v.*



Steedman, 98 Mo. 452, 11 S. W. 993. They took at the sale whatever Mr. Judd had to convey of the interest that Mrs. Smoot inherited from her brother, and they took it subject to her equities. As <sup>692</sup> against Mr. Judd, the plaintiff is entitled to a cancellation of the sheriff's deed under the execution, and as against the purchasers at the partition sale she is entitled to the same, the effect of which is to vest the title of an undivided one-fourth of the land in her, and she is also entitled to an account from them of the rents and profits of her one-fourth interest.

The judgment is reversed and the cause is remanded to the circuit court of Barton county, with directions to enter a decree enjoining defendant Judd from enforcing his judgment rendered at the September term of that court, so far as it affects Mrs. Smoot, and canceling the sheriff's deed to Judd, dated March 10, 1892, and declaring that the plaintiff, Mrs. Smoot, is entitled to an undivided one-fourth of the land described in the petition in the partition suit in spite of the sale made by the sheriff under the decree in that suit, and directing an accounting by defendants Brand and Jackson with plaintiff of the rents and profits had and received by them, respectively, of her undivided fourth, and upon the coming in of the account and ascertaining of the amounts due her, rendering judgment in her favor for the same against those two defendants, respectively, each for the amount he has received, and judgment against all the defendants for costs.

All concur, except Marshall, J., absent.

#### ON REHEARING.

VALLIANT, J. Upon a reconsideration of this cause on the motion for rehearing, we are of the opinion that the ends of justice would be better served by remanding the cause to the circuit court for trial de novo, with leave to defendants, if they see fit, to amend their answer admitting the falsity of the return as made, but averring service in fact of the nature indicated by <sup>693</sup> their evidence, and actual notice to the plaintiff of the pendency of the suit, upon which plaintiff may join issue.

We see no reason to change our views on the law points contained in the original opinion. In their argument on this motion counsel comment on the failure of the plaintiff's husband to testify at the trial. Upon the issue relating to the service as the pleadings were at that trial the husband was not

a competent witness, but if an issue is tendered showing that he was made by the sheriff the agent to deliver the writ to his wife, he would be a competent witness on that point.

The judgment of this court of date March 12, 1901, is therefore so modified that instead of remanding the cause with directions to enter a decree as therein specified, the judgment of the circuit court is reversed and the cause remanded to that court for a trial de novo, according to the views in our original opinion and herein expressed, and with leave to amend the pleadings as above indicated.

Brace, P. J., and Robinson, J., who concurred in the original opinion, concur also in what is here said.

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**Judgment.**—The sheriff's return is not conclusive in equity in a suit for relief from a judgment. There is authority, however, to the contrary: See the monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 244-246.

**Judgment—Married Women.**—On Relief from judgments against married women, see the monographic notes to *Furman v. Furman*, 60 Am. St. Rep. 656-658; *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 254, 260.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**OREGON.**

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**MARKS v. STEPHENS.**

[38 Or. 65, 63 Pac. 824.]

**EXECUTION—MOTION TO QUASH.**—If an execution is irregularly issued, or is being executed in an irregular, oppressive, or fraudulent manner, a motion to quash is the proper remedy for the injured party.

**EXECUTION SALE.—AN INJUNCTION WILL NOT ISSUE** to restrain an execution sale because of irregularity in the issuance of the writ, and in the subsequent proceedings thereunder.

**INJUNCTION AGAINST EXECUTION SALE—ISSUANCE OF—IRREGULARITIES WILL NOT JUSTIFY.**—When the individual personal property of a surviving partner, who is administrator of the partnership estate, is seized under execution on a judgment against the firm, a sale thereunder will not be restrained by injunction, because the execution was issued in the name of a dead man, or the judgment, prior to the issuance of the execution, had been presented as a claim against the estate, and neither allowed nor disallowed, nor because the levy was made on individual personal property. A motion to quash is the proper remedy.

J. C. Fullerton, for the appellant.

Coshow & Sheridan and O. P. Coshow, for the respondents.

<sup>66</sup> **BEAN, C. J.** Injunction by Asher Marks against R. L. Stephens and others to enjoin the sale of personal property belonging to the plaintiff, under an execution issued on a judgment rendered in July, 1891, in favor of John Pearce and others, and against the plaintiff and S. Marks, partners as S. Marks & Co., and one F. C. Buell. The complaint alleges, in substance, that John Pearce, one of the judgment creditors, died in 1891 and S. Marks in 1893; that the plaintiff was appointed administrator of the partnership estate of Marks &



Co., and in 1894 a transcript of the judgment referred to was presented to him, as such administrator, for allowance; that thereafter, on the twenty-eighth day of February, 1899, an execution was issued thereon, and in March one hundred and fifty sacks of wheat, the individual property of the plaintiff, were levied upon and advertised for sale, and will be sold thereunder unless the sheriff is restrained; that such execution was wrongful and unlawful for the reasons: 1. That it was issued in the name of John Pearce, who had died long prior to the date thereof; 2. That prior to its issuance Pearce's administrator had presented the judgment as a claim against the estate of S. Marks & Co., and it had neither been allowed nor disallowed by the administrator thereof; and 3. That the levy on the property of the plaintiff is wrongful and void, because his individual property is not liable to seizure and sale under execution issued on a judgment against the firm of S. Marks & Co. A demurrer to the complaint was sustained in the court below, and the plaintiff appeals.

It is elementary law that an injunction will not issue where there is an adequate remedy at law, and therefore equity will not restrain a levy or sale of property under execution on account of mere errors or irregularities in its issuance or proceedings thereunder; for, as said by Mr. Freeman, "courts of equity do not presume to exercise supervisory power over courts of law with a view of correcting" <sup>67</sup> the decisions of legal tribunals. They interfere only in cases of fraud, accident, mistake, surprise, or where some unconscionable use of a legal right or title is made or threatened. If an execution is irregularly issued, or is being executed in an irregular, oppressive, or fraudulent manner, the court out of which it issued can usually, on motion, grant appropriate and adequate relief; and, where it can do so, equity will not interpose, except to stay proceedings until the ordinary means of obtaining redress can be pursued at law": 2 Freeman on Executions, 2d ed., sec. 436. See, also, 8 Ency. of Pl. & Pr. 475; Stafford v. Sibley, 106 Ala. 189, 17 South. 324; Foard v. Alexander, 64 N. C. 69; Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639. Now, the only ground assigned for relief is alleged irregularity in the issuance of the execution and the subsequent proceedings thereunder, for which a motion to quash in the court issuing the process would have afforded an adequate and complete remedy. There is no allegation of any fact requiring the interposition of a court of equity, or giving it jurisdiction to interfere by injunc-

tion. It is argued that, because the property levied upon is personal, the sale of which would pass the title without right of redemption, equity should interfere by injunction, because such sale might take place before a motion to quash could be heard. But there is no allegation in the complaint upon which to base such a contention, and, if there were, it would not give the court jurisdiction to perpetually enjoin the enforcement of the execution, although, according to some of the authorities, it might stay the proceedings until the motion to quash could be disposed of. It follows from these views that the plaintiff's remedy was by a motion in the court issuing the process, and not by a proceeding in equity. There was, therefore, no error in sustaining the demurrer, and the decree of the court below will be affirmed.

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**Injunction.**—Merely irregular judgments cannot be enjoined, but void ones may be: *Levystein v. O'Brien*, 106 Ala. 352, 54 Am. St. Rep. 56, 17 South. 550. Void proceedings in execution may be restrained: *Forbes v. Hall*, 102 Ga. 47, 66 Am. St. Rep. 152, 28 S. E. 915. But it is held in *St. Louis etc. Ry. Co. v. Lowder*, 138 Mo. 533, 60 Am. St. Rep. 565, 39 S. W. 799, that an injunction does not lie against an execution issued upon a void judgment rendered by a justice of the peace, the defendant having an adequate remedy at law.

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## UNITED STATES NATIONAL BANK OF PORTLAND v. FLOSS.

[38 Or. 68, 62 Pac. 751.]

**NEGOTIABLE INSTRUMENTS—DISHONOR OF BY NON-PAYMENT OF INTEREST.**—A note is not dishonored, by reason of a failure to pay interest prior to the maturity of the principal, in the absence of a stipulation to that effect as it fell due.

**NEGOTIABLE INSTRUMENTS — DEFENSE. — THE BREACH OF AN EXECUTORY CONTRACT,** such as a bond for a deed, which forms the consideration for a negotiable promissory note, is not a defense, in whole or in part, against an indorsee who took the note for value before maturity, though he had notice of the contract, unless he was also informed of the breach before its purchase.

Action by the bank against Floss. A demurrer to the answer was sustained, and the defendant appealed.

Robert C. Wright, for the appellant.

Richard W. Montague, for the respondent.

<sup>68</sup> BEAN, C. J. Action by the United States National Bank against L. Ferd Floss upon a promissory note for six hundred and thirty-nine dollars, executed and delivered by the defendant to Leaner Gray on November 1, 1892; and by her assigned to the plaintiff before maturity. The note contains the stipulation that it shall be paid "in monthly installments of fifteen or more dollars each month, together with the full amount of interest due on this note at <sup>69</sup> the time of payment of each installment; the first installment to be paid one month from the date hereof, and the other installments monthly thereafter until the whole sum has been paid." Each installment of the principal had been paid as stipulated prior to the assignment to the plaintiff, but no payment had been made on the interest. As a defense, the answer sets up: 1. That plaintiff is not a bona fide holder, but took the note with notice of its dishonor on account of the defaulted interest; 2. That the consideration for the note, of which plaintiff had notice at the time of its purchase, was a bond for a deed, made by the payee, containing a stipulation that upon payment of the note at maturity she would convey to the maker certain described premises by good and sufficient warranty deed, free from all liens and encumbrances, and that the title to the land so agreed to be conveyed became encumbered by a judgment lien or otherwise some time between April 22d and December, 1895, and hence she was unable at the maturity of the note to comply with her bond. A general demurrer to the answer was sustained, and its sufficiency is the sole question on this appeal.

1. It is first contended that the note upon which the action is based was dishonored at the time of the purchase by the plaintiff, because of the default in the payment of interest. Several decisions are cited in support of this contention (First Nat. Bank v. Commissioners of Scott County, 14 Minn. 77, 100 Am. Dec. 194; Newell v. Gregg, 51 Barb. 263; National Bank of North America v. Kirby, 108 Mass. 497; Vinton v. King, 4 Allen, 562; Chouteau v. Allen, 70 Mo. 290), some of which, but not all, hold that a failure to pay interest at the agreed date constitutes dishonor of negotiable paper. But the better rule, and the one supported by the text-writers and the great weight of authority, is that a note is not overdue by reason of a failure to pay interest prior to the maturity of the principal, in the absence of a stipulation to that effect, because the interest is a mere incident to the debt: <sup>70</sup> Tiedeman on Commercial Paper, sec. 297; 1 Daniel on Negotiable Instruments, 4th ed.,



sec. 787; *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697; *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10; *Cooper v. Hocking Val. Nat. Bank*, 21 Ind. App. 358, 69 Am. St. Rep. 365, 50 N. E. 775. And certainly this must be so where a note is payable in installments, each of which has been promptly paid as it fell due. The reason for the rule that negotiable paper transferred after maturity is subject to the same defenses in the hands of an assignee as could have been made between the original parties is that payment must be presumed to have been withheld because the maker had some defense. But this reason cannot apply where the installments of principal have been regularly paid, although there may have been default in the payment of interest.

2. It is next insisted that the plaintiff had such notice of the infirmity of the note as would subject it to any defense good against the assignor. The only allegation in the answer upon this subject is "that plaintiff and its officers well knew that interest on unpaid balances at the time of the maturity of many installments was not paid, and plaintiff well knew of the true condition of the title to the said lot, and of clouds upon the same, long prior to May 27, 1896, and at all such times had full knowledge of the facts herein set out, and of facts sufficient to put plaintiff upon full inquiry concerning the said payments, defaulted interest, the bond given in connection with the note, and of the title, and plaintiff also well knew said things long prior to the maturity of the last installment of said note, and long prior to any time when the plaintiff may have become possessed of said note either as collateral security or in its own right." This allegation falls far short of an averment that plaintiff had knowledge of the breach of the bond for a deed when the note was transferred to it. It may possibly be construed to charge that plaintiff knew of the defaulted interest and the consideration of the note at the time of its purchase. But, even if this be true, <sup>71</sup> the failure or inability of the payee to comply with the terms and conditions of her bond is no defense to this action. Mr. Tiedeman says (*Tiedeman on Commercial Paper*, sec. 300): "The authorities generally hold that the purchaser of commercial paper is not burdened with the requirement to see to the execution and full performance of the consideration, merely because he knows what it is." And in 1 *Parsons on Notes and Bills*, 261, it is laid down that "knowledge on the part of the holder, at the time he took the note, that it was not to be paid on a specified contingency, is

not sufficient to defeat his right to recover, although the contingency had then happened, if he was ignorant of this fact."

In *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148, Mr. Justice MacFarlane says: "No well-considered case can be found in which a collateral contemporaneous agreement providing that the note should not be paid in the event that an executory contract, which was the consideration of the note, should not be performed, has been allowed to defeat the negotiability of the note in the hands of an indorsee, though he had notice of such agreement. A great part of the improvement of the country, and of business generally, is carried on with money raised by the discount of notes given upon executory contracts; and if the maker could be allowed to defend against such notes, in case of a breach of contract, on the ground that the indorsee, though in other respects bona fide, had knowledge of the transaction out of which the note grew, all confidence in such notes as negotiable paper would be destroyed, and such business would be paralyzed. By making and delivering a negotiable note, the maker is held to intend that it may be put in circulation, and that no defenses against it exist. In purchasing such note, no inquiry as to the consideration is required. If a failure of consideration occur, the maker must look to the payee for indemnity." The breach of an executory contract which forms the consideration for a negotiable <sup>72</sup> promissory note is not, therefore, a defense in whole or in part against an indorsee who took the note for value before maturity, even if he had notice of the contract, unless he was also informed of the breach before its purchase: *Miller v. Ottaway*, 81 Mich. 196, 21 Am. St. Rep. 513, 45 N. W. 665; *Nebraska Nat. Bank v. Pennock*, 55 Neb. 188, 75 N. W. 554; *Davis v. McCready*, 17 N. Y. 230, 72 Am. Dec. 461; *Siegel v. Chicago Trust etc. Bank*, 131 Ill. 569, 19 Am. St. Rep. 51, 23 N. E. 417. These decisions cover many aspects of the question, from a collateral oral agreement to the recital of the contract or consideration in the note itself. The opinions cover the different phases of the matter so fully, and answer every objection so completely, that it would be unprofitable for us to attempt to restate the argument.

Having reached the conclusion that the note was not dishonored at the time of its purchase by the plaintiff on account of a failure to pay the interest when due, and that the defendant cannot set up as a defense thereto a breach of the bond occurring subsequent to the transfer, it necessarily follows that the

answer does not state facts sufficient to constitute a defense, and the demurrer was properly sustained.

Affirmed.

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**Bills and Notes—Dishonor.**—The mere fact that an installment of interest on a negotiable instrument is overdue and unpaid is not sufficient to affect it with dishonor, and subject it to defenses in the hands of a bona fide holder: *Note to First Nat. Bank v. County Commrs.*, 100 Am. Dec. 197-199. But see *First Nat. Bank v. Forsyth*, 67 Minn. 257, 64 Am. St. Rep. 415, 69 N. W. 909.

**Note.**—A collateral agreement providing that a note shall not be paid if an executory contract forming the consideration therefor shall not be performed, is not allowed to defeat the negotiability of the note in the hands of an indorsee, though he has notice of such agreement; but if the breach has occurred to his knowledge at the time he becomes a purchaser, he is not protected: *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148.

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## SECURITY SAVINGS BANK v. SMITH.

[38 Or. 72, 62 Pac. 794.]

**HUSBAND AND WIFE—POWER OF ATTORNEY—CONSTRUCTION OF.**—A husband having a power of attorney from his wife to exercise supervision over all her lands, to sell any part thereof, or any estate, right, title, or interest that she may have therein or thereto, to make partition of any property or estate that she is interested in, and to mortgage any part of her lands or interest therein, is not authorized to mortgage his own land so as to bar her inchoate right of dower therein.

**AGENCY.**—Authority to borrow money includes the power to execute a promissory note therefor.

Suit by the bank against Smith and wife to foreclose a mortgage. The defendants appealed.

Mitchell & Tanner and John H. Mitchell, for the appellants.

Milton W. Smith, for the respondent.

<sup>73</sup> **WOLVERTON, J.** This is a suit to foreclose a mortgage purporting to have been executed by Preston C. Smith and Susie W. Smith, his wife. The husband having died, the widow was appointed administratrix of his estate. Both the note and mortgage were executed October 1, 1892, by the husband on behalf of the wife, by virtue of a power of attorney executed September 13, 1892, while she was in Madison county, Ala-



bama. The defense is that the power of attorney is inadequate to the purpose of authorizing the husband to execute these instruments in behalf of his wife. The question is one of much difficulty, because it involves the construction of language which is not altogether clear. The authority delegated to the attorney in fact was special, so that the husband became thereby a special agent, with power to transact <sup>74</sup> certain specified business in the name of his principal. Those dealing with such an agent are bound by the authority which he possesses, as it would be iniquitous to involve the principal with matters and transactions to which he has never assented. The undoubted rule is that such a special power should be strictly construed, and that authority is never extended by intendment or construction beyond that which is given in terms, or is necessary for carrying it into effect. In conformity with this idea, it has been held by this court that, when special authority is conferred upon an agent by a formal instrument, two rules of construction should be carefully adhered to: 1. The meaning of the general words in the instrument will be restricted to the context, and construed accordingly; 2. The authority will be construed strictly, so as to exclude the exercise of any power that is not warranted, either by the actual terms, or as a necessary means of executing the authority with effect: *Coulter v. Portland Trust Co.*, 20 Or. 469, 26 Pac. 565, 27 Pac. 266. These rules of construction in no wise conflict, however, with another just as well established, and of equal potency and power, which is that the object of the parties must always be kept in view, and, where the language will permit, that construction should be carried out that will support instead of defeat the purpose of the instrument: *Holladay v. Daily*, 19 Wall. 606. Mr. Justice Walker, in *Hemstreet v. Burdick*, 90 Ill. 444, 450, states the proposition thus: "But it is said that the power must be strictly construed. This may be true, but it does not require that it shall be so construed as to defeat the intention of the parties. Where the intention fairly appears from the language employed, the intention must control. A strained construction should never be given, to defeat that intention, nor to embrace in the power what was not intended by the parties." To the same effect is *Lamy v. Burr*, 36 Mo. 85, 88 Am. Dec. 135; and, generally, as to the propositions here enunciated, see <sup>75</sup> *Gilbert v. How*, 45 Minn. 121, 22 Am. St. Rep. 724, 47 N. W. 643; *Rountree v. Denson*, 59 Wis. 522, 18 N. W. 518; *Dozier v. Free-*

man, 47 Miss. 647; Peckham v. Lyon, 4 McLean, 45, Fed. Cas. No. 10,899; Mechem on Agency, sec. 314.

1. We come now, in the light of these rules of interpretation, to a consideration of the terms of the instrument under which it is claimed that Preston C. Smith was empowered by his wife to bar her inchoate right of dower in and to his lands. The alleged authority is conferred in the following language: "To exercise the general control and supervision over all my lands, tenements, and hereditaments in the state of Oregon, and to grant, bargain, and sell the whole or any part of such lands, tenements, and hereditaments, or any estate, right, title, or interest that I may have therein or thereto, on such terms as to my said attorney shall seem meet; also, to make partition and division of any property or estate, that I am interested in, and to accept and receive my share of such property or estate, and for me and in my name and for my use to borrow moneys, and to mortgage the whole or any part of my lands or interest in lands to secure the same; to demand, receive, and collect any sum or sums of money that are now or may hereafter become due, owing, or payable to me from any person or persons whomsoever, and, upon the receipt thereof, to give and execute acquittances, receipts, releases, or other discharges of the same, and for me and in my name to make, execute, acknowledge, and deliver good and sufficient deeds and conveyances for any of the lands or interest in lands that my said attorney may see fit to dispose of, either with or without covenants of warranty; and generally giving my said attorney full power to do everything whatsoever requisite and necessary in and about my business and affairs, as fully as I could do if personally present." The authority first given is concerning a bargain and sale of lands, and these are described as "my lands." The words, "any part <sup>76</sup> of such lands," subsequently employed, as well as the later clause, "or any estate, right, title, or interest that I may have therein or thereto," refer back to the particular expression or designation, "my lands," so that the language with reference to this subject would seem to restrict a sale to the lands of the wife only. Nor is the power enlarged by the subsequent direction, "and for me and in my name to make, execute, acknowledge, and deliver good and sufficient deeds and conveyances for any of the lands or interest in lands that my said attorney may see fit to dispose of." This is only designed as an authority for carrying into effect the power previously granted to bargain

and sell the wife's lands, or interest in lands, and has reference back again to the words "my lands," or any lands which the wife owned. Coming more particularly to the clause in which we are especially concerned, the attorney in fact is authorized "to make partition and division of any property or estate that I am interested in, and to accept and receive my share of such property or estate, and for me and in my name, and for my use, to borrow moneys, and to mortgage the whole or any part of my lands or interest in lands to secure the same." It will be observed that the power to partition is placed in juxtaposition or close connection under the same clause with the power to mortgage "any part of my lands or interest in lands," so that it is but reasonable to conclude that the reference to "interest in lands" was used in the same sense in either case. We have it, then, that the attorney in fact was empowered to partition any estate in which the wife was interested, and to mortgage any part of such estate or interest therein, and that the words "interest in lands" have reference to such undivided interest as she might have in lands not yet partitioned, and not to her inchoate right of dower in her husband's lands. Taking the whole instrument by its four corners, it does not seem susceptible of any other construction.

It is said that its object is to empower the husband to bar the wife's right of dower, but it does not so appear from the face of the paper, nor from the language employed. In *Wronkow v. Oakley*, 133 N. Y. 505, 28 Am. St. Rep. 661, 31 N. E. 521, the attorney in fact was authorized "to contract for the sale of, and to grant, bargain, sell, and convey all or any lands, tenements, or hereditaments or real estate to me belonging, . . . whether belonging to me individually or jointly with another or others, . . . and, for the purpose aforesaid, . . . to sign, seal, execute, and acknowledge and deliver all necessary or proper contracts, deeds, conveyances, releases, releases of dower and thirds and right of dower and thirds, or other instrument for the conveying, surrendering, and relinquishing all or any part of my estate, right, title and interest, whether vested or contingent, choate or inchoate therein." This was construed by the supreme court (*Wronkow v. Oakley*, 64 Hun, 217, 19 N. Y. Supp. 51), as not conferring authority to bar the wife's dower, upon the ground that the later clauses contained general expressions only, and should not be applied to the particular act stipulated to be done, so as to enlarge its scope and bearing.



But the court of appeals, reversing the supreme court, put its decision upon the ground that the language as to "release of dower," etc., was used for the very purpose of authorizing the husband to do as he did, and that the language of the first clause was not intended to limit these words, and others used for a like purpose and in the same connection. Thus, the whole instrument was construed together, for the ascertainment of the purpose of its execution. So, in *Bertschy v. Bank of Sheboygan*, 89 Wis. 473, 61 N. W. 1115, the intention to authorize the release of dower was manifest from the instrument. But there are no words, clauses, or expressions contained in the instrument under consideration indicative of a purpose to authorize a release or relinquishment of dower or right of dower or thirds, or the conveyance of all interest, whether choate or <sup>78</sup> inchoate. So it is impossible to say from the face of the instrument that its object is to enable the husband to bar the wife's right of dower in his lands. Extrinsicly, we find that the mortgage was executed shortly after the power of attorney, which is a slight indication, perhaps, that it was executed for the purpose for which it was used; but this is not enough to overcome the intendment as it appears upon the face of the instrument. We conclude, therefore, that the power of attorney was inadequate to authorize the execution of the mortgage in question in behalf of the wife.

2. As it concerns the note, the only defense presented by the pleadings and urged here against its validity is that the attorney in fact was not authorized to execute it in her name. But it appears plainly enough that the writing authorized him to borrow money for her use, and to that end it was competent for him to execute the note, and by that means to carry into effect the purposes of the power. There is no issue as to whether the money was borrowed for her use or not. Hence we are confined to the question presented by the record. We conclude, therefore, that the note was well executed in behalf of the wife.

It is claimed by the respondent that the wife by her long silence has ratified the acts of her husband under the power of attorney. But such defense is not pleaded, and cannot, therefore, be considered. For the reasons here stated the decree of the court below will be modified so that it will not bar the wife's right of dower. In all other respects it will be affirmed.

**POWERS OF ATTORNEY BY MARRIED WOMEN.\*****I. Authority of to Make.**

- a. Disability of Married Women to Appoint Attorneys.
- b. Statutory Removal of Disabilities.
- c. Power of Attorney from Wife to Husband.
- d. Power to Convey, Whether Includes Power to Act by Attorney.
- e. Constitutionality of Statutes Validating Conveyances Under Invalid Powers.
- f. Power of Attorney by a Deserted Wife.
- g. Power of Attorney to Release Dower, Validity of.

**II. Construction of.**

- a. Power of Attorney to Release Dower, Sufficiency of.
- b. Power to Convey Lands Need not Describe Them in Detail.
- c. Power to Convey Lands Subsequently Acquired.
- d. Power, When Applied to Separate Estate as Well as to Right of Dower.
- e. Strict Construction of Powers, When Applicable.
- f. Power to Borrow Money, When Includes Power to Mortgage.
- g. Power to Sell does not Include Power to Dedicate.
- h. Power to Convey Interests as Heir does not Include Community Property.
- i. Difference Between Powers to Sell and Powers to Convey.
- j. General Words, When Restricted to the Special Act Authorized.

**III. Mode of Executing.**

- a. Taking and Certifying the Acknowledgment.

**IV. Revocation.**

- a. By Marriage.
- b. By War.

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**\*REFERENCES TO MONOGRAPHIC NOTES.**

Conveyance of homestead: 65 Am. Dec. 482-489.

Power of attorney given by two or more, construction of: 22 Am. St. Rep. 726, 727.

Power of attorney—Whether should be limited to property then owned by principal: 35 Am. St. Rep. 593-595.

Power of married women to contract under American statutes: 99 Am. Dec. 599-610.

Validity of deed under power of attorney: 81 Am. Dec. 776-778.

**V. Homesteads.**

- a. Joinder of Husband and Wife in Conveyancing is Essential.
- b. Powers to Convey, When not Construed as Applying to.

**VI. Judgments, Power of Attorney to Confess or Transfer.****I. Authority of to Make.**

a. **Disability of Married Women to Appoint Attorneys.**—At common law, a married woman could not appoint an attorney, even to plead for her: *Oulds v. Sansom*, 3 Taunt. 261; *Phillips v. Burr*, 4 Duer, 113; and it is laid down unqualifiedly in some of the states of this country that a married woman cannot make a valid power of attorney, even jointly with her husband, to make a deed of her interest in property: *Earle v. Earle*, 20 N. J. L. 347, 350; *Sumner v. Conant*, 10 Vt. 9; *Kearney v. Macomb*, 16 N. J. Eq. 189; *Holland v. Moon*, 39 Ark. 120; *Batte v. McCaa*, 44 Ark. 398; *Hardenburgh v. Lakin*, 47 N. Y. 109. Thus, it has been held that a married woman cannot convey her lands by power of attorney: *Batte v. McCaa*, 44 Ark. 398; *Holland v. Moon*, 39 Ark. 120; that she cannot acknowledge a conveyance of real estate by an attorney in fact: *Dawson v. Shirley*, 6 Blackf. 531; that a wife's power of attorney to her husband, authorizing him to convey her separate real estate is void, and that the husband's deed thereunder does not divest her of title, or estop her from afterward claiming the property: *Halbert v. Brown*, 9 Tex. Civ. App. 335, 31 S. W. 535; and that a married woman cannot join with the attorney of her husband in executing a deed of her land, so as to effectually pass title thereto: *Toulmin v. Heidelberg*, 32 Miss. 268.

b. **Statutory Removal of Disabilities.**—The common-law disabilities of married women have, to a great extent, been removed by statute in this country, and in some of the states a married woman may constitute her husband her attorney, and may revoke such appointment: See the monographic note to *Kantrowitz v. Prather*, 99 Am. Dec. 600, on the power of married women to contract under American statutes. In the state of Washington the relations of husband and wife have been so changed that, in the absence of an express statute allowing one to be constituted the attorney for the other, the power so to do would exist: *Richmond v. Voorhees*, 10 Wash. 316, 319, 38 Pac. 1014, per Hoyt, J. A married woman is *sui juris* to the extent of the enlarged capacity to act conferred by statute; and the common-law incapacity of married women cannot serve as a shield to protect them from the consequences of their acts, when they have statutory capacity to act: *Bodine v. Killeen*, 53 N. Y. 93.

c. **Powers of Attorney From Wife to Husband.**—A wife may appoint her husband her attorney in fact if the statute authorizes her "to execute, acknowledge, and deliver her power of attorney,



with like force and effect, and in the same manner, as if she were a single woman": *Wronkow v. Oakley*, 133 N. Y. 505, 28 Am. St. Rep. 661, 31 N. E. 521. A power of attorney from a wife to her husband, purporting to authorize him to grant, bargain, sell, and convey all lands belonging to her individually and jointly with others, and for the purpose aforesaid, and in her name to execute and deliver all necessary conveyances, releases of dower and thirds, or right of dower and thirds, or other instruments for conveying, surrendering, or relinquishing all or any part of her estate, right, title, or interest, whether vested or contingent, choate or inchoate, empowers him to sign his wife's name to a conveyance of lands owned by himself, and therein and thereby to release her right of dower: *Wronkow v. Oakley*, 133 N. Y. 505, 28 Am. St. Rep. 661, 31 N. E. 521.

d. **Power to Convey, Whether Includes Power to Act by Attorney.**—At common law a wife was disabled from aliening her lands by deed, either by herself or by uniting with her husband. The only way in which she could convey an estate of freehold owned by her was by levying a fine or suffering a common recovery. But this was altered by statute, which provided other means for the conveyance of estates; and in most, if not all, of the states of the American Union, statutes have been passed providing for the manner in which a married woman can dispose of her real estate. Many of these statutes, and probably all, provide for a separate acknowledgment on the part of the wife, and this has been said to be the most important and essential element in the method employed to transfer such estates: *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. Rep. 279, 7 App. Cas. D. C. 116; *Wambole v. Foote*, 2 Dak. Ter. 1. And when power is given by statute to married women to convey their interest in real estate, where their husbands join in the conveyance and where the private examination is made, the wife's right to dispose of it by power of attorney joined in by her husband, and where she was privately examined, etc., "would naturally be implied," because power to do the principal thing directly should enable one to do it by power of attorney. The wife's right to convey includes the power to appoint another to do the same thing: *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. Rep. 279, 7 App. Cas. D. C. 116. "In most of the states," said Mr. Justice Field, in *Holladay v. Daily*, 19 Wall. 606, 609, "a married woman cannot, in the absence of statutory authority, execute, either alone or in connection with her husband, a valid power of attorney to convey her interest in real property"; but no particular reason is perceived for this rule where the wife can do the principal thing herself, and this appears to be the view taken by the supreme court of the United States. "We do not," said Mr. Justice Peckham, in delivering the opinion of the court in *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. Rep. 279, a case from the District

of Columbia, *Williams v. Paine*, 7 App. Cas. D. C. 116, "think the aid of a statute is necessary. Where the power is given her by law to convey directly, she can by the same ceremonies authorize another to do the act for her. The reasoning which would prevent it is, as we think, entirely too technical, fragile, and refined for constant use."

In *Williams v. Paine*, 169 U. S. 55, 63, 18 Sup. Ct. Rep. 279, 7 App. Cas. D. C. 116, it was held that, under the laws of Maryland, which were in force in the District of Columbia in 1859, it was then competent for a married woman, outside of the district, to execute, with her husband, a power of attorney to convey her lands therein, which, when acknowledged by her according to the statute relating to the acknowledgment by married women of deeds conveying their real property in the district, thereby became a valid and sufficient instrument to authorize the conveyance by attorney; and that the first section of the curative act, passed by Congress on March 3, 1865 (13 Stats., c. 110, p. 531), contained a clear legislative recognition of the right to execute such power. In Wisconsin, a husband may act as the agent of his wife in transactions relating to her separate estate, and may execute in her name a conveyance of her land under a power of attorney. Hence a power of attorney from her to him, and a deed from her to the plaintiff, executed by her husband as her attorney in fact, are admissible in evidence: *Weisbrod v. Chicago etc. Ry. Co.*, 18 Wis. 35, 86 Am. Dec. 743.

e. **Constitutionality of Statutes Validating Conveyances Under Invalid Powers.**—A married woman in California was incompetent to execute a power of attorney prior to the act of April 3, 1863: *Dow v. Gould & Curry etc. Min. Co.*, 31 Cal. 629; *Dentzell v. Waldie*, 30 Cal. 138. That act which validated powers of attorney before then executed by married women, in which the husband joined, and which also validated all conveyances of the wife's property theretofore made under such powers, was held in *Dentzell v. Waldie*, 30 Cal. 138, to be constitutional. Under the California statute mentioned, authorizing a married woman to make and execute powers of attorney for the sale, conveyance, or encumbrance of her real or personal estate, "provided her husband joins in the execution of the instrument," etc., it is not necessary, in a power of attorney made by a wife for the sale of her separate estate, that the husband's name should be mentioned in the body of the instrument as a joint constituent with his wife, it being sufficient that the husband sign, seal, and acknowledge the instrument in proper form; or that such power should, in terms, authorize the attorney to sign the name of the husband to the deed: *Dentzell v. Waldie*, 30 Cal. 138, 146, 150; but it is necessary that a husband should join in the execution of a power of attorney, given by his wife, by affixing his signature to the instrument in writing. The

act mentioned did not validate powers of attorney theretofore made by married women, to which the husband had not assented in writing. If a married woman's separate property was sold by her attorney in fact, in her name, before that act, the sale was not validated by that act, where the husband did not join in the execution of the power by affixing his signature in writing, and a sale so made since that act is void, because a married woman's power of attorney is void unless her husband joins in the execution thereof by affixing his signature thereto in writing: *Dow v. Gould & Curry etc. Min. Co.*, 31 Cal. 629, 647, 657.

**f. Power of Attorney by a Deserted Wife.**—In Texas, the signature and consent of a husband, who has deserted his wife, are not necessary to the validity of a power of attorney, to manage, repair, sell, and convey, given by his wife, who is vested with power to manage and control her separate property, in her own protection as a feme sole; and where the property is in a dilapidated condition, it is liable for a mechanic's lien arising under a contract with the agent for its repair: *Wright v. Blackwood*, 57 Tex. 644.

**g. Power of Attorney to Release Dower; Validity of.**—It has been held that a married woman cannot give a valid power of attorney to release her inchoate right of dower: *Lewis v. Coxe*, 5 Harr. 401; *Steele v. Lewis*, 1 T. B. Mon. 48; but the later cases hold that she can do so: *Wronkow v. Oakley*, 133 N. Y. 505, 28 Am. St. Rep. 661, 31 N. E. 521, reversing 64 Hun, 217; *Bertschy v. Bank of Sheboygan*, 89 Wis. 473, 61 N. W. 1115; *Hull v. Glover*, 126 Ill. 122, 18 N. E. 198. A wife may appoint her husband her agent by power of attorney to convey her inchoate interest in his real estate: *Wilkinson v. Elliott*, 43 Kan. 590, 19 Am. St. Rep. 158, 23 Pac. 614; *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273, 21 Pac. 159; *Wronkow v. Oakley*, 133 N. Y. 505, 28 Am. St. Rep. 661, 31 N. E. 521, the holding in which is more fully stated near the beginning of this note; and an instrument duly executed by himself, and by him for her under such authority, is affectual to transfer such interest: *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273, 21 Pac. 159.

## II. Construction of Powers.

**a. Power of Attorney to Release Dower, Sufficiency of.**—Under a statute providing that a wife who joins with her husband in the execution of a power of attorney respecting land shall be bound, in respect to her right therein, as if she were sole, a married woman who so joins for the sale and conveyance of lands owned by the husband, and for the express purpose of relinquishing her dower, thereby bars any right of dower she may have in the land, where a conveyance is made by the attorney under such power: *Hull v. Glover*, 126 Ill. 122, 18 N. E. 198. So, a power of attorney duly



executed by husband and wife, authorizing the attorney to convey "any of the real estate of which we or either of us are seised," effectually enables the attorney to bar the wife's dower by a conveyance under the power, although such power does not expressly state that it authorizes the attorney to bar the wife's dower in her husband's lands: *Bertschy v. Bank of Sheboygan*, 89 Wis. 473, 61 N. W. 1115.

**b. Power to Convey Lands Need not Describe Them in Detail.**—A power of attorney to convey lands need not describe in detail the lands authorized to be conveyed, and a power granted by a wife to her husband "to execute and acknowledge, sign, seal, and deliver any deed or deeds for the conveyance or assurance of all my right, title, and interest in and to any lands and tenements the title to which is in the said D. S. Munger, and in which I have any interest as being the wife of him, said D. S. Munger," is sufficient to authorize the conveyance of her interest in any lands then owned by D. S. Munger within the county where the power of attorney was recorded: *Munger v. Baldridge*, 41 Kan. 236, 13 Am. St. Rep. 273, 21 Pac. 159.

**c. Power to Convey Lands Subsequently Acquired.**—It is well settled that when the evident purpose of a power of attorney is to enable the attorney in fact to control and convey land obtained after the execution of such power, it will be so construed, and this doctrine has been applied when the power authorizes the attorney "to sign my name to all conveyances of real estate to which I have any right of dower": *Benschoter v. Atkins*, 25 Neb. 645, 41 N. W. 639; *Benschoter v. Lalk*, 24 Neb. 251, 38 N. W. 746.

A power of attorney which in general words authorizes the agent to sell, mortgage, and convey any and all real estate or property belonging to the principal should not be limited to the property owned by him at the time of the execution of the power. The rule supported by the weight of authority seems to be that a power authorizing the attorney to alienate all property owned by the principal authorizes the former to convey not only all property owned by the latter at the time of the execution of the power, but also all that he may thereafter acquire before the power is revoked; and this rule applies to a power given by a wife to her husband: See the monographic note to *Penfield v. Warner*, 35 Am. St. Rep. 593-595, discussing the question as to whether a power of attorney should be limited to property then owned by the principal.

**d. Power When Applied to Separate Estate as Well as to Right of Dower.**—A power of attorney given by a wife to her husband to "sign my name to all conveyances of real estate to which I have any right of dower, as to real estate both in the city of Chicago, Illinois, and in the town of Loup City, Sherman county, Nebraska, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever

required and necessary to be done in and about the premises, it being intended to convey hereby all my right, title, and interest, in and to the above-described real estate," will not be limited so as to authorize the attorney to convey the dower interest of the principal alone, but it will be construed to empower him to convey all the right, title, and interest of the principal of whatever kind or nature in the real estate described, and to apply to lands acquired by the latter subsequent to its execution and before its revocation, as well as that owned and possessed by her at the time the power was made and given: *Benschoter v. Atkins*, 25 Neb. 645, 41 N. W. 639; *Benschoter v. Lalk*, 24 Neb. 251, 38 N. W. 746.

**e. Strict Construction of Powers, When Applicable.**—All powers of attorney receive a strict interpretation, and the authority is never extended by intendment or construction beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect, and that authority must be strictly pursued: *Gilbert v. How*, 45 Minn. 121, 22 Am. St. Rep. 724, 47 N. W. 643; *Penfold v. Warner*, 96 Mich. 179, 35 Am. St. Rep. 591, 55 N. W. 680; monographic note to *Davenport v. Parsons*, 81 Am. Dec. 776-778, on the validity of a deed under a power of attorney. "A power of attorney, like any other instrument, is to be construed according to the natural import of its language; and the authority which the principal has conferred upon his agent is not to be extended by implication beyond the natural and ordinary signification of the terms in which that authority has been given. The attorney has only such authority as the principal has chosen to confer upon him, and one dealing with him must ascertain at his own risk whether his acts will bind the principal": *Golinsky v. Allison*, 114 Cal. 458, 46 Pac. 295, per Harrison, J. Thus, a power to sell and convey real estate does not authorize the attorney to mortgage it: *Jeffrey v. Hursh*, 49 Mich. 31; *Morris v. Watson*, 15 Minn. 212; *Salem Nat. Bank v. White*, 159 Ill. 136, 42 N. E. 312; *Campbell v. Foster Home Assn.*, 163 Pa. St. 609, 43 Am. St. Rep. 818, 30 Atl. 222.

**f. Power to Borrow Money, When Includes Power to Mortgage.**—A power of attorney by a wife to her husband authorizing him "to borrow, upon such terms and conditions as he may deem best, any sum or sums of money, and to sign and deliver any promissory note or notes for the payment of the same, and to execute and deliver as collateral thereto any mortgage or mortgages covering any real estate or other property situated in said state of Washington owned by me or in which I have any interests," clearly authorizes the husband to execute a note and mortgage as incident to the more general authority to borrow money. It also, authorizes the husband to deal with any class of property in which the wife may have an interest in her individual capacity or as a member of the community: *Richmond v. Voorhees*, 10 Wash. 316, 38 Pac. 1014.

**g. Power to Sell does not Include Power to Dedicate.**—A general power of attorney by a wife to her husband to sell land does not authorize him to make a dedication for street purposes: *Anderson v. Bigelow*, 16 Wash. 198, 47 Pac. 426.

**h. Power to Convey Interests as Heir does not Include Community Property.**—A widow's power of attorney to dispose of all lands belonging to her husband's estate, of which she is the lawful heir, does not authorize the attorney to sell her community interest in the husband's land: *Wynne v. Parke* (Tex. Civ. App., March, 1895), 30 S. W. 52.

**i. Differences Between Powers to Sell and Powers to Convey.**—In *Dayton v. Nell*, 43 Minn. 246, 45 N. W. 231, a distinction was made between a power to "sell" and a power to "convey." "A person," said Mitchell, J., "may give another authority to sell land without giving him authority to execute conveyances, or he may give him power to execute conveyances without the power to make sales, or he may give him power to do both. Authority to convey can only be given by deed, while authority to sell may be given by parol, and, until a recent statute, even verbally." He also said: "We think the correct statement of the law is that the power to sell, as distinguished from the power to convey, may be modified or changed by parol, and that, where the power is both to sell and convey (the power to convey being general and without limitation), if the agent exceeds his authority as to the terms of sale, and executes a conveyance, the deed is voidable merely, and the sale may be ratified by parol." In that case, a husband and wife jointly executed a power of attorney authorizing their agent, one Johnson, to sell the real estate of the wife "for such sums and at such prices as to him might seem meet," and to "make, execute, acknowledge, and deliver good and sufficient deeds and conveyances for the same." Subsequently, the wife gave to Johnson by letter, not under seal, and without the joinder of her husband, directions to convey the property, without consideration, to her son. The agent, at the request of the son, conveyed the property without consideration to the latter's wife, and it was held that the conveyance was not void: *Dayton v. Nell*, 43 Minn. 246, 45 N. W. 231.

**j. General Words When Restricted to the Special Acts Authorized.**—If authority to perform a specific act is given in a power of attorney, and general words are also employed therein, such words are limited to the particular acts authorized: *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235; note to *Gilbert v. How*, 22 Am. St. Rep. 726; *Rountree v. Denson*, 59 Wis. 522, 18 N. W. 518. In *Velle v. Rutherford*, 8 Manitoba, 168, 173, a married woman gave her husband a power of attorney on a form supplied by a bank, giving him power and authority to transact for her and in her name five separate and distinct classes of business. It began with authority "to make, draw, accept, and indorse, in favor of all parties whom-



soever, all promissory notes, bills of exchange, drafts, checks, and orders for the payment of money," and closed by giving authority "to manage and transact all manner of business whatsoever with the branch of the Bank of British North America, in Winnipeg, their manager or other officer duly authorized." A note sued on had been signed by the defendant's husband under this power, and it was held that the clause in the power respecting notes, etc., conferred a general power that was not limited or restricted by the subsequent clause having special reference to the bank. A power given by a married woman, to place "the property in thorough repair," is not limited and restricted by a clause authorizing the agent "to pay over such sums out of the rental arising as may be necessary to pay off the cost of such repairs," as such clause was merely intended to confer a power as to the use of the money received, not elsewhere provided for, and not to operate as a restriction upon the power of the agent to contract for repairs: *Wright v. Blackwood*, 57 Tex. 644. In construing powers of attorney given by married women, the intention of the giver must be considered: *Wright v. Blackwood*, 57 Tex. 644; *Wronkow v. Oakley*, 133 N. Y. 505, 28 Am. St. Rep. 661, 31 N. E. 521. Thus, in a case which went to the supreme court of the United States from Colorado, a husband and wife had given a power of attorney, in general terms, to sell and convey real property, the title to which was stated in the power to be in one Holladay. There was no provision against a sale of the interest of either separately; nor was there any other circumstances to restrain the attorney's authority in that respect. The court held that the attorney's conveyance of the land, by a deed executed in the husband's name alone, passed his title; and said, by Field, J.: "Undoubtedly, it is a rule that a special power of attorney is to be strictly construed, so as to sanction only such acts as are clearly within its terms; but it is also a rule of equal potency that the object of the parties is always to be kept in view, and where the language used will permit, that construction should be adopted which will carry out, instead of defeating, the purpose of the appointment. Here, the object, and the sole object, of the power was to enable the attorney to pass the title freed from any possible claim of the wife; and, under the law of Colorado, that result could be accomplished by the deed of the husband alone as fully without as with her signature": *Holladay v. Dally*, 19 Wall. 606. A wife's power of attorney to her husband to release mortgages is not admissible to prove that he is her general agent: *Trimble v. Thorson*, 80 Iowa, 246, 45 N. W. 742.

### III. Mode of Executing.

a. **Taking and Certifying the Acknowledgment.**—It is not required that a power of attorney should be executed in the presence of the officer before whom it is acknowledged, nor is it material

that he should know that the signature was written by the grantor. If the grantor acknowledges before the officer the due execution of the instrument, he thereby recognizes and adopts the signature as his own. It is a substantial compliance with the requirements of the statute concerning an acknowledgment to a power of attorney, where the officer certifies that at a certain time "came Julia P. Munger, who is personally known to me to be the identical person whose name is affixed to the foregoing instrument of writing as grantor, and duly acknowledges that she executed the same, and for the purposes therein set forth": *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273, 21 Pac. 159. In this case, it was also objected that the deed conveying the property was not legally acknowledged. The challenged portion of the certificate read as follows: "Came D. S. Munger and Julia P. Munger, his wife, by D. S. Munger, her attorney in fact, who are personally known to me to be the same persons who executed the foregoing instrument of writing, and duly acknowledged the execution of the same." "It might have been more explicit," said the court, "in stating that D. S. Munger acknowledged the execution of the deed for himself, and also in his representative capacity for his principal, Julia P. Munger. But as the plural form of expression is used, it plainly implies an acknowledgment in both his individual and representative capacities, and that in the latter capacity he acknowledged the deed as the act of his principal, who was named in the certificate": *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273, 21 Pac. 159. So, where a husband and wife have executed a mortgage, the latter by power of attorney, and the certificate of acknowledgment, after setting out the appearance and acknowledgment by the husband, continues: "And I do further certify that personally appeared Peter Voorhees, personally known to me to be the same person whose name is subscribed to the within instrument as the attorney in fact of Mary A. Voorhees, his wife, and the said Peter Voorhees duly acknowledged to me that he subscribed the name of Mary A. Voorhees thereto as principal, and his own as attorney in fact; and that said Peter Voorhees acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned"; such certificate shows a sufficient acknowledgment by the husband in behalf of the wife, as well as in his own behalf. "If it," said the court, "had been intended thereby only to certify the acknowledgment by the husband for himself, there would have been no need of that part of the certificate of acknowledgment above set forth. Hence, there could have been but one purpose on the part of the acknowledging officer in including it in his certificate, and that was to show a proper acknowledgment by the attorney in fact for and on behalf of his principal": *Richmond v. Voorhees*, 10 Wash. 316, 38 Pac. 1014.

#### IV. Revocation.

**a. By Marriage.**—The marriage of a feme sole, with notice, revokes a power of attorney executed by her, and her attorney's deed, made after such marriage, conveys no title: *Judson v. Sierra*, 22 Tex. 365, 371; *Wambole v. Foote*, 2 Dak. Ter. 1, 17. But it is otherwise where there is a power coupled with an interest in the obligee. Thus, if a feme sole gives a warrant of attorney to confess judgment on her bond, and afterward marries, the warrant is not revoked: *Eneu v. Clark*, 2 Pa. St. 234, 44 Am. Dec. 191.

**b. By War.**—As war does not revoke every agency, it has been held that a power of attorney by a married woman, properly executed and acknowledged, to convey her lands, was not revoked by the Civil War, although when hostilities broke out she was residing in one of the northern states, and she and her husband afterward removed to the south, where the latter entered the Confederate service, and where the wife resided until the close of the war: *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. Rep. 279.

#### V. Homesteads.

**a. Joinder of Husband and Wife in Conveyancing is Essential.** The general rule is, that a homestead cannot be alienated unless the husband and wife join in the deed: See the monographic note to *Poole v. Gerrard*, 65 Am. Dec. 482-489, on conveyance of homestead. Even the husband and wife themselves cannot by mutual conveyances confer upon each other the power to convey the homestead by a sole deed: *Spoon v. Van Fossen*, 53 Iowa, 494. A conveyance of the homestead from the husband to the wife cannot operate as a power of attorney: *Spoon v. Van Fossen*, 53 Iowa, 494.

**b. Powers to Convey When not Construed as Applying to.**—A power of attorney given by a wife to her husband to "sign deeds and mortgages, with full power and authority to do and perform all and any acts whatsoever requisite and necessary to be done in and about the premises, as fully and to all intents and purposes as I might or could do if present, with full power of substitution and ratification, hereby ratifying and confirming all that my said attorney or his substitutes shall lawfully do, or cause to be done, by virtue hereof," but not describing any real estate, nor referring in any way to their homestead, is too general and indefinite to authorize the husband to execute a mortgage on the homestead signed by him for himself and as attorney in fact for his wife. A mortgage so executed is void: *Wallace v. Travelers' Ins. Co.*, 54 Kan. 442, 45 Am. St. Rep. 288, 38 Pac. 489.

#### VI. Judgments, Powers of Attorney to Confess or Transfer.

Authority to sell and assign a judgment may be conferred by a power of attorney: *Caley v. Morgan*, 114 Ind. 350, 16 N. E. 790; but a bond and warrant of attorney by a married woman, to confess a judgment, though her husband join with her, is, as to her,



not merely voidable, but absolutely void: *Dorrance v. Scott*, 3 Whart. 309, 31 Am. Dec. 509; *Caldwell v. Walters*, 18 Pa. St. 79, 55 Am. Dec. 592. A judgment entered upon a bond and warrant of attorney by a married woman and a sale of her estate made thereunder are void: *Dorrance v. Scott*, 3 Whart. 309, 31 Am. Dec. 509. As a married woman cannot, by signing a warrant of attorney, bind herself to confess a judgment, her acknowledgment of the power gives it no validity, for the officer is not authorized to take such an acknowledgment: *Patton v. Stewart*, 19 Ind. 233. As warrants of attorney by married women to confess judgments, and judgments and proceedings thereon to sell their real estate, are without authority and void in Pennsylvania, a sheriff's sale founded thereon will not divest their estates, notwithstanding a statute of that state providing that an execution sale on a judgment afterward reversed for error shall pass title to realty, and that restitution only of the price paid at the sale shall be made: *Caldwell v. Walters*, 18 Pa. St. 79, 55 Am. Dec. 592.

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### BRAND v. MULTNOMAH COUNTY.

[38 Or. 79, 60 Pac. 390, 62 Pac. 209.]

**THE STATE HAS POWER TO FIX OR CHANGE THE GRADE OF STREETS** and public highways within the corporate limits of cities and towns, although it has previously delegated to such municipalities the requisite authority to do so.

**PUBLIC STREETS CANNOT BE BURDENED WITH ANY ADDITIONAL SERVITUDE**, other than that which properly and legitimately attaches to them as public streets and highways, without just compensation being made to the abutting lot owner.

**MUNICIPAL CORPORATIONS—CHANGE OF STREET GRADE—DAMAGES—LIABILITY.**—A municipality is not answerable in damages for injuries resulting from the establishment of, or a change in, street grades, unless specially required to respond by some constitutional, statutory, or charter provision.

**EMINENT DOMAIN—INJURY WHICH ARISES FROM ESTABLISHING OR CHANGING A STREET GRADE IS NOT A "TAKING" OF PROPERTY** within the meaning of a constitutional inhibition that private property shall not be taken for public use without compensation.

**HIGHWAYS.**—A BRIDGE connecting public highways and for public use is itself a public highway, and constitutes part of the highways with which it is connected.

**LICENSE TO TAKE TOLLS—EXPIRATION OF, AND ITS EFFECT.**—When a license to take bridge tolls has expired, the right to the free use of the bridge as a public highway becomes vested in the people.

**MUNICIPAL CORPORATIONS—APPROACH TO BRIDGE—ADDITIONAL SERVITUDE—FIXING STREET GRADE—**

**ABUTTING OWNERS.**—When the legislature grants a franchise to a company to build a bridge across a river, to connect streets on each side thereof, the ends of the bridge being above the streets which it connects, and one of the approaches to the bridge is so constructed, under legislative authority, that it practically occupies the whole street along which it runs from a certain cross-street to the river, and constitutes an elevated roadway above the original surface of the street, the structure does not constitute an additional servitude, but is merely an establishment of the grade upon that part of the street occupied by the approach, and which invades no private right of an abutting owner, though it interferes with access to his lots.

**STATUTES—CURATIVE ACT AS TO STREET GRADE.**—A statute declaring the approach to a bridge, in a city, to be the established grade of a certain street, so far as occupied thereby, cures irregularities in the original appropriation of the street to such purpose, though passed after the decision of the trial court in a suit to enjoin the continuance of the approach.

Bill to enjoin the continuance of a structure in a street in front of the plaintiff's lots. The legislature authorized the Columbia Street Bridge Company to construct and maintain a bridge across the Willamette river, between the cities of Portland and East Portland, for general use, and specified in the act that the western approach to the bridge should conform to the grade of Front street, which had been established by competent authority. This approach was on Madison street. The plaintiff's lots extended east to the river, and were bounded on the west and south by Front and Madison streets. The grade of Madison street from Front street to the river had never been established, except as authorized by the act above mentioned. The bridge was built with an open roadway left in the center of its western approach, leading from the eastern line of Front street down the incline on Madison street, giving ingress and egress to the plaintiff's buildings situate on his lots on the river bank, which were much lower than the bridge approach. The bridge committee, appointed by law, subsequently purchased the bridge, and succeeded to all the powers and authority granted to the bridge company. Afterward, the city became the owner of the bridge and franchise, and Multnomah county, in pursuance of law, assumed the management and control of the bridge. The bridge committee, claiming to have lawful authority, closed up the roadway under the bridge leading to the waterfront, and caused the west approach to the bridge to be made even and solid; but before it did so it petitioned the common council of the city of Portland for its consent, which was accorded, but with a provision that the "commission restore the driveway if not satisfactory to property owners." The roadway, after it

was closed, was kept and maintained in that condition, and such closing deprived the plaintiff of the means of ingress and egress with teams and vehicles to and from his said buildings by way of Madison street. The western approach was two hundred and sixty-one feet in length, and conformed to the grade of Front street. The defendant, the East Side Railway Company, had a franchise for operating its street railway over the bridge, and had a double track thereon, directly over the space formerly left open for the roadway. The bridge, after its completion, was used by the general public, and was free of tolls, except when the bridge company had it, that company having been authorized to charge and receive tolls. The plaintiff filed a bill against Multnomah county, the city of Portland, and the East Side Railway Company, to enjoin each of the defendants from maintaining the said bridge and the western approach thereto in the condition above stated, and to require them to reopen the said roadway under the bridge, from Front street to the plaintiff's waterfront buildings. The defendants prevailed and the plaintiff appealed.

Fenton, Bronaugh & Muir, William T. Muir, and William D. Fenton, for the appellant.

Joel M. Long, city attorney, William A. Cleland, Ralph R. Duniway, and Russell E. Sewall, district attorney, for the respondents.

91 WOLVERTON, C. J. 1. Primarily, the state has paramount control over all the highways within its borders, including public streets and highways within the confines of municipalities. Whatever authority a municipality may enjoy or possess, pertaining to its streets and highways, must be derived from the legislative assembly through its franchise or charter; and such a corporation acts, if at all, through a delegated power emanating from the initial source: 2 Dillon on Municipal Corporations, 4th ed., secs. 680, 683; Winters v. George, 21 Or. 251, 259, 27 Pac. 1041; Simon v. Northup, 27 Or. 487, 501, 40 Pac. 560. Nor does the mere fact that the state has delegated certain powers to the municipality inhibit it from again resuming or exercising such powers. Hence it is said: "The legislature of the state represents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the weight of more recent judicial opinion) to the property rights and easements of the abutting owner, full and para-



mount authority over all public ways and public places": 2 Dillon on Municipal Corporations, 4th ed., sec. 656. The logical and cogent result of these principles is that the state, as well as the cities and towns to which it has previously delegated the requisite authority, may fix and establish the grade of the streets and public highways within the corporate limits of such municipalities.

2. Whatever right the municipality may acquire in and about its public streets—whether through dedication or by condemnatory proceedings—or whatever may be the property interests which remain or are left vested in the owner of property abutting thereon, it has come to be settled, if ever it was seriously controverted, that they cannot be burdened with any additional servitude, other than that which properly and legitimately attaches to them as public streets <sup>92</sup> and highways, without just compensation being made to the abutting lot owner: *Willamette Iron Works v. Oregon Ry. etc. Co.*, 26 Or. 224, 46 Am. St. Rep. 620, 37 Pac. 1016; *Huddleston v. Eugene*, 34 Or. 343, 55 Pac. 868; 1 *Municipal Corporation Cases*, 3340; *Barney v. Keokuk*, 94 U. S. 324, 340.

3. The authorities are uniform to the purpose, however, that a municipality does not entail any liability for consequential damages resulting from the fixing or establishment of a street grade, unless specially required to respond by some constitutional, statutory, or charter provision: 2 Dillon on Municipal Corporations, 4th ed., sec. 686; *Willamette Iron Works v. Oregon Ry. etc. Co.*, 26 Or. 224, 37 Pac. 1016, 46 Am. St. Rep. 620; *Kelly v. Mayor of Baltimore*, 65 Md. 171, 3 Atl. 594.

4. The authorized establishment of a street grade, although the change may result in consequential damages to the abutting property, is not a "taking," within the meaning of the clause of our constitution (Or. Const., art. 1, sec. 18), providing that "private property shall not be taken for public use." The doctrine is well illustrated by the case of *Northern Transp. Co. v. Chicago*, 99 U. S. 635, where the legal distinction is specifically drawn between the term "taken," as used in the constitution of the United States and the earlier state constitutions, and the phrase "taken or damaged," in the later ones. It is there said: "Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking, within the meaning of the constitutional provision." After the work complained of in that case had been substan-

tially completed, the people of Illinois adopted another constitution, whereby it was ordained that private property should not be taken or damaged for public use without compensation; and, as thus adopted, it was held to <sup>93</sup> be an enlargement of the common provision for the protection of private property. In a later case (*Chicago v. Taylor*, 125 U. S. 161, 166, 8 Sup. Ct. Rep. 820), which directly involved its construction, it was held that it "required compensation in all cases where it appeared that there had been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." It is apparent that the interpolation of the words "or damaged" constitutes an innovation upon the usual provision, and explains the divergent views of the courts on the subject, and this is a cogent re-enforcement of the doctrine as quite uniformly maintained and held to under the United States constitution, and those state constitutions containing a like or similar provision in respect of the "taking" of private property for public use. Judge Cooley states the generally accepted rule as follows: "Any proper exercise of the powers of government which does not directly encroach upon the property of an individual, or disturb him in its possession or enjoyment, will not entitle him to compensation or give him a right of action": *Cooley's Constitutional Limitations*, 6th ed., 666. The rule was directly applied by him, while upon the bench, in the case of *Pontiac v. Carter*, 32 Mich. 164, which was an action to recover damages for raising the grade of a public way, wherein he asserts that the weight of authority against the action is overwhelming, and sustains the assertion by a citation and review of a great number of cases. In further support of the rule, see *Stewart v. Clinton*, 79 Mo. 603; *Kehrer v. Richmond City*, 81 Va. 745; *Skinner v. Hartford Bridge Co.*, 29 Conn. 523; *Smith v. Corporation of Washington*, 20 How. 135; *In re Ridge St.*, 29 Pa. St. 391; *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307; *Roberts v.* <sup>94</sup> *Chicago*, 26 Ill. 249. A bridge connecting public highways, and erected for the general use and accommodation of the public, whether built and maintained at public expense, or by a private corporation authorized to charge and collect tolls from persons using the same, is itself a public highway, and constitutes part of the highways with which it

is connected: Pittsburg etc. Pass. Ry. v. Point Bridge Co., 165 Pa. St. 37, 30 Atl. 511.

5. In this connection it may be stated, as a general proposition, that, when a franchise or license to take tolls has expired, thereafter the right to the free use of such bridge as a public highway becomes vested in the people: State v. Lawrence Bridge Co., 22 Kan. 438.

6. We come now to an application of these principles to the facts which characterize this case. The legislature, in granting authority to construct the Madison street bridge, specially prescribed that its western approach should conform to the grade of Front street, and it was so constructed, in observance with the legislative will. The width of the bridge was not designated in the act, but the grant carried with it the authority to erect such a structure as would reasonably accommodate public travel across the river at that point; and no question is made that the structure is unnecessarily cumbersome, or occupies more space than is requisite to meet the demand. As constructed, it practically occupies Madison street, from First street to the river, and constitutes an elevated roadway above the original surface of the street; and the broad contention is that the bridge constitutes an additional servitude upon the street, which plaintiff is entitled to have abated, or the structure so modified from its present condition as to give plaintiff access to his waterfront buildings. We are of the opinion that the grant of authority to the bridge company to erect a bridge connecting the public highways theretofore terminating at the river banks, particularly specifying that the structure should conform <sup>95</sup> at its western approach to the grade of Front street, was, under the conditions prevailing, an establishment of the grade of that part of Madison street to be occupied by said approach. It has resulted in an entire diversion of public travel from the original surface of Madison street to the highway constituted by the bridge structure.

7. In Wilkin v. St. Paul, 33 Minn. 181, 22 N. W. 249, the defendant entered into a contract with certain railroad companies which were maintaining tracks and operating railroads upon Third street in said city, whereby the companies agreed to construct upon the southerly portion of the street, over the tracks, and twenty feet above the established grade, a roadway twenty-four feet wide, with projecting sidewalks increasing its width to thirty-six feet, leaving uncovered and unoccupied thirty feet of the street. It was further agreed that the com-



panies should construct approaches leading up to the roadway of the bridge, and should close and keep closed for travel that part of the street lying along the bridge and not occupied thereby, so as to deflect such travel to the bridge. An injunction was granted, upon the suit of the owner of lots abutting upon that portion of the street to be occupied by the bridge structure, restraining the companies from carrying the contract into effect, upon the ground that it would result in a change of the grade of that part of the street occupied by the bridge; and upon appeal to the supreme court the injunction was sustained. It was held that the contemplated work was intended to, and would, raise the established grade twenty feet; that, in effect, it would make the grade of the bridge, and necessarily of the approaches to it, the traveled street grade between the two ends of the work; and such grade not having been established, and compensation paid the abutter, as required by the city charter, the work was consequently restrained. The central idea upon which the case turned was that the purpose of the authorities was to bring about an actual change of grade, and that such <sup>96</sup> would be the effect, in practical operation, if the contract was carried out, and, such being its effect, the change could not be legally accomplished in that manner.

In another case (*Selden v. Jacksonville*, 28 Fla. 558, 29 Am. St. Rep. 278, 10 South. 457), a suit was instituted to enjoin the construction of a viaduct over and above numerous railroad crossings upon a public street by four railway companies under an agreement with the county and city, and to make the surface of the viaduct, instead of the original surface of the occupied street, the grade for public use and travel. It was held that the construction of the viaduct would effectuate a change of grade, and the suit having proceeded upon the theory that the municipal government of Jacksonville was erecting the structure, not as a joint party with the other parties to the agreement, but in the due exercise of its charter powers to change the grade of streets, though under agreement with the several parties named as codefendants, by which they were to contribute to the expenses, it was concluded that the viaduct would not become or constitute an additional servitude upon the street, for which compensation should be recovered. So, in *Willeys Mfg. Co. v. Board of Chosen Freeholders*, 62 N. J. L. 95, 40 Atl. 782, it was held that, a bridge having been constructed for the purpose of joining together the two parts of

the highway bisected by a waterway, the approaches thereto became a part of the highway, and that they constituted no additional burden thereupon. In that case the city of Trenton had, by proper proceedings taken for the purpose, acquired the right to use the locus in quo for the purpose of the public highway. These cases while not to the exact purpose, serve to indicate very clearly what acts would be considered or would constitute an actual change of grade; so that, if the legislative assembly has employed language in connection with the subject matter calculated to induce the doing of such acts, we must conclude that <sup>97</sup> it intended to establish the grade, and to require the change, in pursuance of the exercise of the franchise granted. The language of the act is that said approach "shall conform to the grade of Front street." The bridge itself was to become a highway, and the approaches constitute a part of it. The legislative purpose was to divert the public travel upon the bridge—the newly constituted highway—which was to occupy, so far as the western approach is concerned, that portion of Madison street extending from Front street to the river. So the conclusion is inevitable that the legislative will was also to establish the grade in conformity with Front street when it required the structure to conform to the grade of that street, and such is the legitimate effect of the act.

It is stoutly contended that the case of Willamette Iron Works v. Oregon Ry. etc. Co., 26 Or. 224, 46 Am. St. Rep. 620, 37 Pac. 1016, ought to be, and is, controlling, to the purpose that the Madison street approach constitutes an additional servitude. But there is a radical distinction between the two cases. In that case the approach was constructed without pretense of a grant of authority to change the grade of the street; nor did it, or the bridge to which it was joined, form any part of, or an extension of, any public highway. Not <sup>so</sup> with the case at bar. The bridge and the approaches, as we have seen, form and constitute a part of the public highway, meeting and joining public streets or highways, extending to the river at each end thereof, giving continuous travel from and upon said streets upon and across the bridge; and the approach complained of, being constructed upon the authorized grade of Madison street, constitutes the established grade thereof, supplanting the Madison street surface, as used and occupied prior to its construction. It is true that, in the construction of the bridge by the Columbia Street Bridge Company, it left the roadway open through the approach on Madison <sup>98</sup>

street leading to plaintiff's waterfront buildings; but it is apparent from what we have said that it was not required to do so, being authorized, in a practical sense, to raise the surface grade of the street by means of the approach. The leaving of the roadway was but a matter of accommodation, to meet the convenience of the property interests on the river bank, subject to be closed at the behest of the bridge company. The bridge committee succeeded to all the powers and authority granted to the bridge company under the franchise, and, among others, the right and authority to close up the roadway leading to the waterfront, and thus make the bridge approach a solid structure throughout its entire width. The fact that permission was asked of the city of Portland, and granted, upon the condition that the commission restore the roadway if not satisfactory to property owners, does not alter the case. There was no attempt by the city to alter the grade of the street; nor could it, if it had so desired, accomplish such a purpose in that manner. The only purpose was to give its consent, in so far as it had any control in the premises, to the bridge committee to act, the committee being, in a substantial sense, the agent of the city. Subsequently, however, the city became the owner of the bridge and franchise, and, the county having assumed the operation thereof, insists that the roadway shall be kept closed; so that the bridge company having been granted the authority in the first instance to raise the surface grade of the street by means of the solid approach to the bridge, and the present authorities having succeeded to the franchise, it follows that they have the right to so maintain it. This view of the case is strengthened by reason of the fact that the bridge company has surrendered its franchise and right to take tolls, so that, in practical operation, its free use has become vested in the public; thus disendowing it of the only remaining characteristic of a private concern, and putting it <sup>99</sup> upon the broad basis of a public highway, to all intents and purposes.

We have not attempted to distinguish this case as one affecting riparian rights, as the rules and principles we have applied are alike applicable, whether the change of grade is of a street extending to the water's edge or otherwise, and the result will be the same in either case. These considerations affirm the decree of the court below, and it so ordered.



## ON REHEARING.

WOLVERTON, C. J. 8. A careful re-examination of the vital questions attending this controversy has brought us to the same conclusion expressed in the former opinion. The pivotal issue is whether the bridge, with its approach upon Madison street, constitutes an additional servitude, or has perverted the street to other than legitimate street purposes. If such is its effect, the plaintiff presents a substantial basis for a decree in accordance with the prayer of his complaint; otherwise not. There is but little, if any, conflict in the law, which is aptly and succinctly stated, with its proper limitations and distinctions, in *Willis v. Winona City*, 59 Minn. 27, 60 N. W. 814. In that case the city, under authority of the state and national legislatures, constructed a bridge across the Mississippi river, the approach of which extended a considerable distance along the center <sup>100</sup> of one of the streets of the city, and past the plaintiff's property, and the question arose whether it constituted an additional servitude, in determining which Mr. Justice Mitchell says: "The doctrine of the courts everywhere, both in England and in this country (unless Ohio and Kentucky are exceptions), is that, so long as there is no application of the street to purposes other than those of a highway, any establishment or change of grade made lawfully, and not negligently performed, does not impose an additional servitude upon the street, and hence is not within the constitutional inhibition against taking private property without compensation, and is not the basis for an action for damages, unless there be an express statute to that effect. That this is the rule, and that the facts of this case fall within it, is too well established by the decisions of this court to require the citation of authorities from other jurisdictions: *Lee v. Minneapolis*, 22 Minn. 13; *Alden v. Minneapolis*, 24 Minn. 254; *Henderson v. Minneapolis*, 32 Minn. 319, 20 N. W. 322; *Yanish v. St. Paul*, 50 Minn. 518, 52 N. W. 925. See, also, *Northern Transportation Co. v. Chicago*, 99 U. S. 635; *Selden v. Jacksonville*, 28 Fla. 558, 29 Am. St. Rep. 278, 10 South. 457. The New York elevated railway cases cited by plaintiff are not authority in his favor, for they recognize and affirm the very doctrine that we have laid down in *Story v. New York Elev. Ry. Co.*, 90 N. Y. 122, 43 Am. Rep. 146, but hold that the construction and maintenance on the street of an elevated railroad operated by steam, and which was not open to the public for the purpose of travel and traffic, was a perversion of the street from street uses, and

imposed upon it an additional servitude which entitled abutting owners to damages. Neither does *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. 629, aid the plaintiff, for that case proceeds upon the proposition <sup>101</sup> that the construction and maintenance of an ordinary commercial railway upon a street is the imposition of an additional servitude. Plaintiff also cites numerous cases as to what constitutes a 'taking' of private property. The law of those cases is unquestioned. There is no doubt that the acts of the city would amount to a taking of plaintiff's property, so as to entitle him to compensation, provided the use made of the street by the city imposed an additional servitude upon it; but that is the very question in the case. Our conclusion is that the construction and maintenance of this bridge approach did not impose an additional servitude upon the street, but was a proper street use, and hence constitutes no basis for an action in favor of plaintiff for damages."

This case affords a complete answer to the counsel's contention that there is a "taking" in the present instance, within the purview of the state and national constitutions, and, as the reasoning of the learned justice is so apt for our present purposes, we have taken the liberty to quote at much length from the opinion. The doctrine of the *New York, elevated railway cases* and of *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. 629, is not questioned, but it is not applicable to this controversy. In those cases there was an additional servitude created—in the former, by the construction of the elevated railway; and, in the latter, by an ordinary commercial railroad upon the streets. Other *New York cases* present apt illustrations of the distinction which obtains between the legal effect of a structure which constitutes an additional servitude and one which is effective merely in producing a change in the street grade. They hold that the construction of an ordinary railroad upon a street is an additional burden or servitude, for which compensation may be recovered, yet that the change of a grade upon lateral streets, made necessary to effectuate a convenient crossing of the railroad, does not constitute a burden for which the abutter is entitled to <sup>102</sup> compensation: *Randolph on Eminent Domain*, sec. 399; *Uline v. New York etc. R. R. Co.*, 101 N. Y. 98, 53 Am. Rep. 123, 4 N. E. 536; *Conklin v. New York etc. Ry. Co.*, 102 N. Y. 107, 6 N. E. 663; *Rauenstein v. New York etc. Ry. Co.*, 136 N. Y. 528, 32 N. E. 1047. To the same

purpose, see, also, *Robinson v. Great Northern Ry. Co.*, 48 Minn. 445, 51 N. W. 384, and *Wead v. St. Johnsbury etc. R. R. Co.*, 64 Vt. 52, 24 Atl. 361.

All these approve the doctrine that a mere change in a street grade, lawfully accomplished, without negligence or carelessness on the part of the proper authorities, does not entitle the abutters to compensation for any inconvenience that may be entailed thereby. It was said in *Conklin v. New York etc. R. R. Co.*, 102 N. Y. 107, 6 N. E. 663, Mr. Justice Finch speaking for the court: "The plaintiff's fee in it to its center line was not subjected to a new or different use involving a new or added compensation, but it remained unchanged as the public highway originally laid out in everything but its grade. If it became such by dedication, compensation for the easement was expressly waived. If taken by right of eminent domain, the compensation paid covered all the damages sustained, among which were necessarily embraced such as might flow from a change of grade required for the public use and convenience. That might be altered by any lawful authority, and whatever of injury or inconvenience should result to the abutting owner was either waived by the dedication, or paid for by the original compensation, so that a change of grade upon a highway invades no private right. The contrary doctrine, once held (*Fletcher v. Auburn etc. R. R. Co.*, 25 Wend. 462), has been effectually overruled: *Radcliff v. Mayor of Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Bellinger v. New York C. R. R. Co.*, 23 N. Y. 42; *Selden v. Delaware Canal Co.*, 29 N. Y. 634. The appellant here relies upon *Story v. New York Elev. Ry. Co.*, 90 N. Y. 122, 43 Am. Rep. 146. That <sup>103</sup> case was not intended to thus unsettle the law, for it expressly excluded from its operation injuries resulting from changes of grade." Nor do the cases of *Pumpelly v. Green Bay Canal Co.*, 13 Wall. 166, *Eaton v. Boston etc. R. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147, and others holding to the same doctrine, help the plaintiff, for in those cases there was a physical invasion of the real estate of the private owner by a permanent flooding, which was regarded as a taking within the meaning of the constitutional inhibition. These cases are characterized by Mr. Chief Justice Fuller in *Gibson v. United States*, 166 U. S. 269, 17 Sup. Ct. Rep. 578, as containing the "extremest qualification" upon the doctrine which is everywhere established except, perhaps, in Ohio and Kentucky.



Willis v. Winona City, 59 Minn. 27, 60 N. W. 814, is in point and authoritative to the purpose that the bridge approach constructed upon Madison street does not constitute an additional servitude thereon. It is also authority for the other proposition held to in the first opinion, namely, that the legislative authority given the bridge company to construct the bridge and its approach, specifying that such approach should be put upon the established grade of Front street, was in itself an establishment of the grade upon that part of the street occupied by the approach. Mr. Justice Mitchell says: "The bridge is just as much a public highway as is Main street, with which it connects; and, whether we consider the approach as a part of the former or of the latter, it is merely a part of the highway. The city having, as it was authorized to do, established a new highway across the Mississippi river, it was necessary to connect it, for the purpose of travel, with Main and the other streets of the city. This it has done, in the only way it could have been done, by what, in effect, amounts merely to raising the grade of the center of Main street in front of plaintiff's lot. It can make no difference in principle whether this was <sup>104</sup> done by filling up the street solidly, or, as in this case, by supporting the way on stone or iron columns. Neither is it important that the city raised the grade of only a part of the street, leaving the remainder at a lower grade." So, too, it was held in Colclough v. Milwaukee, 92 Wis. 182, 65 N. W. 1039, that the construction, under legislative authority, of an elevated approach to a viaduct which occupied the whole street, constituted but a mere change of the grade thereof for the corresponding distance, but not an additional servitude for which the abutter was entitled to compensation. Mr. Justice Pinney says: "It is impossible, we think, to maintain that the construction of this approach to the viaduct is not really a mere change of the grade of the street for the corresponding distance, and of which it takes the place. It is in the nature of a bridge which is an extension of a highway or street, and the street beneath is practically discontinued."

9. We feel assured that our former opinion is sound upon the proposition; but, if we are mistaken in this, the act of 1898 (Sess. Laws 1898, sec. 231, p. 185), declaring the bridge approach to be the established grade of Madison street so far as occupied thereby is curative of the irregularities complained of, although such act may have been adopted after the commencement, or even decision, of the present suit in the court

below: *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421, and *The Clinton Bridge*, 10 Wall. 454. For the reasons here stated, the former opinion will be adhered to.

Affirmed on rehearing.

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**Streets—Change of Grade.**—A constitutional guaranty that private property shall not be taken without compensation does not extend to consequential damages resulting to abutting property from lawful changes of the grade of the street: *Selden v. Jacksonville*, 28 Fla. 558, 29 Am. St. Rep. 278, 10 South. 457. Compare *Eachus v. Los Angeles*, 130 Cal. 492, 80 Am. St. Rp. 147, 62 Pac. 829; extended note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 837.

**Streets—Additional Servitude.**—Any structure on a street subversive of its use and efficiency as a public thoroughfare imposes a new servitude on the rights of abutting owners for which compensation must be made: *Willamette Iron Works v. Oregon Ry. etc. Co.*, 26 Or. 224, 46 Am. St. Rep. 620, 37 Pac. 1016.

On Curative Statutes affecting street improvements, see *Nottage v. Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883. Consult, also, *Windsor v. Des Moines*, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476.

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## HOWELL v. FOLSOM.

[38 Or. 184, 63 Pac. 116.]

**HUSBAND AND WIFE—MORTGAGE, BY WIFE, OF ESTATE BY ENTIRETY.**—Under statutes authorizing a wife to sell and convey her property, by her sole deed, "to the same extent and in the same manner that her husband can property belonging to him," she may mortgage her interest in land held by the entirety with like effect as her husband, and such a mortgage is valid, although the husband did not join in its execution.

George G. Bingham, for the appellant.

R. J. Fleming and Tilmon Ford, for the respondent.

186 BEAN, C. J. On November 21, 1895, the defendant, Maggie Folsom, being the owner, with her husband, of an estate by the entirety in lots 3 and 4, block B, in Simpson's addition to Salem, mortgaged the same to plaintiff to secure a loan of three hundred and fifty dollars; and, the husband having subsequently died, this suit was instituted to foreclose the mortgage, but the court held it void because the husband did not join in its execution, and plaintiff appeals.

1. It is argued in support of the decree of the court below that neither spouse can convey an estate by the entirety with-

out the assent of the other, and therefore the mortgage sought to be foreclosed is void, even as against the mortgagor. It is often said in judicial opinions that at common law, under a conveyance of real property to husband and wife, both are seised of the entirety, and neither can alienate or dispose of any part of the estate without the consent of the other. It is believed, however, this means that "one cannot sever the interest or make any disposition of the estate so as to affect the right of survivorship": *Enyert v. Kepler*, 118 Ind. 34, 10 Am. St. Rep. 94, 20 N. E. 539; *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269, and note. According to <sup>187</sup> the great weight of authority, at common law a conveyance of the estate by the husband during the lifetime of the wife is valid as against him, and vests the fee in the purchaser in case the husband survive the wife. Mr. Tiedeman thus states the rule: "During coverture the husband has the entire control of the estate, may convey it away, and it is liable to be sold under execution for his debts. If the husband survives the wife, this conveyance of it to a stranger will be as absolute as if the estate had been one in severalty. But if the wife survives the husband, she acquires, by right of survivorship, the entire interest in the land, and is entitled to her proper action for the recovery of possession": Tiedeman on Real Property, sec. 242. And Mr. Washburn says: "If the husband convey the entire estate during coverture, and dies, his conveyance will not have affected her rights of survivorship to the entire estate. But if, in such case, the husband survive, his conveyance becomes as effective to pass the whole estate as it would have been had the husband been sole seised when he conveyed it": 1 Washburn on Real Property, 5th ed., 707. See, also, 1 Bishop on Married Women, sec. 621; 1 Ballard on Real Property, sec. 240; 15 Am. & Eng. Ency. of Law, 2d ed., 848; *Den v. Hardenbergh*, 10 N. J. L. 42, 18 Am. Dec. 371, and note; *Branch v. Polk*, 61 Ark. 388, 54 Am. St. Rep. 266, and note, 33 S. W. 424; *Hiles v. Fisher*, 144 N. Y. 306, 43 Am. St. Rep. 762, 768, and note, 39 N. E. 337. We take the rule, therefore, to be abundantly established that a husband can convey an estate held by himself and wife as tenants by the entirety, and that such conveyance will vest the fee in the purchaser, if the husband survive the wife. And, as our statute has given the wife power and authority to sell and convey her property "to the same extent and in the same manner that her husband can property belonging to him" (*Laws 1893*, p. 170, amending section 2992 of *Hill's Annotated*



Laws), we think it clear she may convey an estate by the <sup>188</sup>entirety with like effect as her husband. The right at common law of the husband during coverture to the control and usufruct of the land, and the inability of the wife to convey without her husband joining in the deed, were not incidents of such an estate, but of the marital disabilities and rights which have been removed and enlarged by modern legislation. The courts of other states have held that, under acts relating to married women, of similar import to ours, the wife is entitled to the same use and benefit of an estate by the entirety as the husband, and has the same power of alienation. Thus, in *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52, 9 Atl. 695, it was held, under the legislation of that state, which preserves to married women their separate rights of property, that the wife is endowed with the capacity, during the lives of herself and husband, to hold in her possession one-half the estate held by them as tenants by the entirety in common with her husband, as fully as if she were a single woman. In *Hiles v. Fisher*, 144 N. Y. 306, 43 Am. St. Rep. 762, 39 N. E. 337, a husband and wife were seised of an estate by the entirety. The husband alone mortgaged the entire estate to secure his individual debt, and subsequently conveyed the property to his wife. Thereafter the mortgage was foreclosed, and the purchaser at the sale insisted that he was entitled to the possession of the entire property during the joint lives of the husband and wife, and to the fee in case the husband survived the wife, while the wife maintained that the mortgage given by her husband was void because not signed by her, and that, his interest having been conveyed to her, she was the absolute owner of the property. But the court held, in a very satisfactory opinion by Mr. Chief Justice Andrews, that, under the general statutory provisions of that state giving married women power to control or dispose of their own property, a husband and wife are entitled to the rents and profits of an estate by the entirety in separate moieties, <sup>189</sup> and that a purchaser at a foreclosure sale, under a mortgage given by the husband alone when the wife is alive at the time of the sale, obtains the husband's interest, subject to the right of the wife, if she survive him, with a right to use an undivided half during the joint lives of husband and wife, and to the fee if the husband survive. Again, in *Branch v. Polk*, 61 Ark. 388, 54 Am. St. Rep. 266, 33 S. W. 424, under a statute authorizing a married woman to dispose of her property as a feme sole, it was held that she

might convey or mortgage her interest in an estate by the entirety, subject to the right of survivorship in her husband, without his joining in the instrument, and that such mortgage was valid as against the wife, she having survived her husband.

2. It was suggested at the argument that under section 3003 of Hill's Annotated Laws, a married woman cannot convey her real property without her husband joining in the deed. But that section has been modified or amended by subsequent legislation (Laws 1893, p. 170, which amends section 2992 of Hill's Annotated Laws), and she may now sell or convey her property by her sole deed: *Velten v. Carmack*, 23 Or. 282, 31 Pac. 658. The decree of the court below is therefore reversed, and a decree will be entered here as prayed for in the complaint.

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A Wife May Convey and Mortgage her interest in an estate held by herself and her husband as tenants by the entirety, subject to his right of survivorship: *Branch v. Polk*, 61 Ark. 388, 54 Am. St. Rep. 266, 33 S. W. 424.

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### SHARP v. JOHNSON.

[38 Or. 246, 63 Pac. 485.]

**REPLEVIN WILL NOT LIE** for an undivided interest in personal property.

**ATTACHMENT—UNDIVIDED INTEREST IN PERSONALTY.**—A sheriff, in attaching an undivided interest in a chattel, such as a horse, has the right to take it into custody, and is not guilty of trespass in so doing.

**AGISTMENT—LIEN.—INDEPENDENTLY OF THE STATUTE** or special agreement, one who feeds or cares for an animal of another has no lien thereon for his charges.

**AGISTMENT—LIEN—PART OWNERSHIP.**—Under a statute giving a lien to one who feeds or cares for the stock of another, one who feeds and cares for an animal of which he is part owner is not entitled to an agistor's lien.

**AGISTMENT—LIEN—FURNISHING FEED.**—While one who feeds or cares for another's stock may be entitled to a lien for the feed and care furnished by himself, he is not entitled to a lien for feed and care furnished in part by other people, though he may have paid therefor.

**AGISTMENT—NONLIENABLE ITEMS.**—No agistor's lien can be maintained, under the Oregon statute, for freight, entrance, and jockey fees paid in handling a horse on a race circuit.

**REPLEVIN BY CO-OWNER—RETURN OF PROPERTY.**—When one co-owner's undivided interest in personal property is attached, the fact that the property, at the time of the attachment,

was in the possession of the other owner does not entitle the latter, in a replevin suit, to a return of the property taken.

Action by Mrs. Sharp against Johnson to recover the possession of a racehorse called Black Alder. Mrs. Sharp alleged that she was the owner of an undivided one-third interest in the horse; that one Bradley owned the other two-thirds; that she had an agistor's lien on Bradley's interest; and that she was in possession of the animal when the defendant wrongfully and unlawfully took him from her. It appeared from the defense that the horse belonged to Mrs. Sharp's husband and Bradley, who were indebted to one Hays for the animal's purchase price; that Hays caused the horse to be attached as their property; and that the sheriff had taken the horse into his custody. The defendant alleged that Mrs. Sharp's pretended purchase of the horse from her husband and her claim for an agistor's lien was the result of a conspiracy between her and him to cheat Bradley out of his interest and Hays out of his debt. The defendant moved for a nonsuit, which motion was overruled. There was a judgment for the plaintiff and the defendant appealed.

W. C. Hale and H. D. Norton, for the appellant.

John M. Williams and L. F. Harris, for the respondent.

**248** BEAN, C. J. 1. The motion for a nonsuit was based on the theory that the plaintiff failed to prove a cause sufficient to be submitted to the jury, and we think should have been sustained. The plaintiff claims title to an undivided third interest in the animal in controversy by purchase from her husband. She testified that such interest was transferred to her on the 25th of January, 1897, two days after the purchase from Hays, in consideration of money she had previously advanced to her husband for the payment of certain bills and expenses incurred by him. She gave evidence tending to support her claim, which, while far from clear or satisfactory, was perhaps sufficient to authorize a finding by the jury that she was the owner by purchase of her husband's undivided interest. But this alone would not entitle her to **249** recover possession of the animal, because replevin will not lie for an undivided interest in personal property: Shinn on Replevin, sec. 206; Cobbey on Replevin, 2d ed., sec. 238; 20 Am. & Eng. Ency. of Law, 1st ed., 1050; Phipps v. Taylor, 15 Or. 484, 16 Pac. 171; Huffman v. Knight, 36 Or. 581, 60 Pac. 207.



Unless, therefore, she was entitled to possession as against the creditors of Bradley, the co-owner, she cannot prevail in this action, although she may be the owner of an undivided interest therein.

2. The interest of one tenant in common in personal property may be attached for his individual debt, and the officer may take all the property into his custody without being guilty of a conversion as to the other tenant's share. "This," says Mr. Freeman, "is merely one of the disagreeable incidents of their joint ownership. In no other way could the interest of the defendant be subject to execution; for an execution sale of chattels not in the possession of the sheriff, nor present at the sale, would invite their sacrifice, and could not be tolerated. Taking possession is not optional with the officer. He must take possession, or in some way subject the property to his control, in order to make a valid levy and sale": 2 Freeman on Executions, 3d ed., sec. 254a. See, also, 1 Freeman on Executions, sec. 125; Drake on Attachments, 6th ed., sec. 248; Waldman v. Broder, 10 Cal. 378; Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147; Veach v. Adams, 51 Cal. 609; Remington v. Cady, 10 Conn. 44; Gaar v. Hurd, 92 Ill. 315.

3. This brings us to the question of the validity of the plaintiff's alleged lien on Bradley's interest, for, unless she was entitled to hold possession as against him by reason of such lien, her action must fail. It seems from the testimony that the plaintiff's husband is a horse trainer, and that he and Bradley purchased Black Alder for the purpose of taking him around the country to the various racecourses, and entering him for races; that Sharp, or the plaintiff, as she **250** contends, was to have charge of him for both parties, and to be allowed twenty dollars a month for keeping and training him; that at the time of bringing the action she claimed a balance due for such services, and for freight, shoeing, entrance money, and jockey fees, of four hundred and ten dollars and seventy-two cents, and a lien on the horse therefor. This amount is made up of a charge of twenty dollars a month for training and feed from January 23 to March 23, 1897, thirty dollars a month from March 23 to November 23, 1897, and twenty dollars a month from November 23, 1897, to March 23, 1898, besides other items mentioned. So it will be seen that the lien is claimed for feed from the time of the purchase by Sharp and Bradley, on the 23d of March, 1897, down to a few days before the attachment, without any statement as to

whether such feed was furnished by the plaintiff or by other parties. It is well settled that, independently of the statute or special agreement, one who feeds or cares for an animal of another has no lien thereon for his charges, because he does not impart any new or added value to it, nor does he come within the policy of the law which gives innkeepers a lien on the baggage of their guests, because he is not bound to receive all animals that may be brought to him for keeping, but may refuse them if he sees fit, or impose such terms as he pleases: 1 Jones on Liens, 2d ed., sec. 641; 2 Am. & Eng. Ency. of Law, 2d ed., 12.

4. We must therefore look to the statute to determine the question. Section 3684 of Hill's Annotated Laws provides that "any person who shall depasture or feed any horses, cattle, hogs, sheep, or other livestock, or bestow any labor, care, or attention upon the same at the request of the owner or lawful possessor thereof, shall have a lien upon such property for his just and reasonable charges for the labor, care, and attention he has bestowed, and the food he has furnished, and he may retain possession of such property until such charges be paid." Now, the manifest design of this provision is to give to a bailee of livestock, who depastures, feeds, or cares <sup>251</sup> for it, at the request of the owner or lawful possessor, a lien thereon for the food furnished or care bestowed by him, and the right to retain the possession until his charges are paid. To come within its purview, it would seem that the animal must belong to another; for one who feeds and cares for an animal of which he is a part owner cannot be said to have rendered the care and furnished the feed at the request of the owner or lawful possessor, and this is an essential ingredient of such a lien.

5. But, however this may be, the statute is intended to give a lien to one who, at the request of the owner or lawful possessor, shall feed, depasture, or bestow labor and care upon an animal the property of another, for such feed or labor furnished by him, but not when furnished by another, although he may have paid for the same. The plaintiff has manifestly not brought herself within the law. She or her husband had possession of the horse, as a part owner, for the use and benefit of themselves and their co-owner, Bradley, and the feed and care for which the lien is claimed were, in part, at least, necessarily furnished by other people at places

where the horse was entered for races, who, under the statute, might have had an agistor's lien.

6. The other items for which a lien is claimed, such as freight, entrance, and jockey fees paid, are clearly not lienable. The charges made by plaintiff or her husband against Bradley, and for which they claim a lien, arose in consequence of their joint ownership and joint adventure. For such expenses the statute gives no lien. Thus, in *Auld v. Travis*, 5 Colo. App. 535, 39 Pac. 357, it was held, under a statute substantially the same as ours, that one partner was not entitled to a lien upon the cattle of the partnership for food furnished by him, the court saying: "The lien is for food and care expended upon the cattle of another, where the cattle are intrusted to his care. They must be delivered into his possession and subject to his control, and the bailment <sup>252</sup> is such, and his possession so exclusive, that he may maintain trespass or trover against a wrongdoer for any injury to their possession." And, after reviewing the facts in the particular case, the court proceeds: "This brief statement shows the impossibilities of maintaining a lien where the requirements are: 1. That the cattle should be the property of another, in which the agistor had no rights of ownership; 2. That the stock was delivered for the purposes of the agistment, under a contract of hire, with an agreement to pay for the food and care." So, also, in *Armitage v. Mace*, 96 N. Y. 538, where a mare was delivered to another, under an agreement by which he was to take her around the country to enter her for races, the owner to pay all expenses and the earnings to be divided, it was held that the expenses incurred for the board and shoeing of the animal while traveling with her did not give the possessor a lien under the statute.

7. The contention is made by the plaintiff that the property was in her possession at the time it was attached, that the defendant was guilty of trespass in taking it into his custody, and that she was therefore entitled to recover on that ground alone. The horse was in a barn, in the possession of the plaintiff and her husband, and within the curtilage of their dwelling-house, when taken by defendant, and hence the presumption is that he was in the possession of the husband and was his property: 9 Am. & Eng. Ency. of Law, 1st ed., 801; *Stewart on Husband and Wife*, sec. 119. And this would probably be sufficient to support the attachment under the statute. But, whether it would or not, mere possession by the



plaintiff would not be sufficient to entitle her to a return of the property, because her possession was that of her co-owner, Bradley, and, as we have seen, the sheriff, in attaching Bradley's interest, had a right to take the horse into his custody. It follows from these views that the judgment of the court below must be reversed and the cause remanded, with directions to allow the motion for a nonsuit.

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**To Recover in Replevin, the Plaintiff Must be the sole owner, or have the exclusive right of possession. An undivided interest is not sufficient: See the monographic note to Sinnott v. Feiock, 80 Am. St. Rep. 751.**

**A Sheriff Attaching a Cotenant's Interest in Property may detain possession of the whole property until sale under execution: Note to Bernal v. Hovious, 79 Am. Dec. 151.**

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## WASHINGTON INVESTMENT ASSN. v. STANLEY.

[38 Or. 319, 63 Pac. 489.]

**MORTGAGE — FORECLOSURE — COMPLAINT — SUFFICIENCY OF.**—In a suit to foreclose a mortgage, the complaint shows a good cause of action and will support a decree, although it neither sets up the mortgage by copy or exhibit, nor states the substance or purport of its provisions, where such objection is not made until after issue joined, and where the complaint sets out in full the note sued on, its ownership and nonpayment, and the fact that it is secured by a regularly recorded mortgage on certain described land.

**BUILDING AND LOAN ASSOCIATIONS—CAPACITY OF. TO ENFORCE CONTRACTS—ESTOPPEL TO DENY.**—Those who have borrowed money from a building and loan association, accepted its stock, and dealt with it in its corporate capacity, are estopped to deny the capacity of the association to enforce its contracts, on the ground of defective organization, where it has apparently attempted, in good faith, to comply with the law governing its organization.

**BUILDING AND LOAN ASSOCIATIONS—FOREIGN CORPORATION—AUTHORITY TO DO BUSINESS—EVIDENCE OF.** A foreign building and loan association has prima facie authority to do business in this state, where it holds a certificate from the secretary of state, certifying that it has complied with the requirements of the law entitling it to do business in this state.

**BUILDING AND LOAN ASSOCIATIONS—RATE OF PREMIUMS—RATE OF INTEREST—DISTINCTION—USURY.**—In a statute concerning building and loan associations, which provides that their by-laws shall fix the amount of premium on loans and the rate of interest thereon; that the provisions of such statute relating to bidding on loans shall not apply to those associations which fix in their by-laws the rate of interest and premium on

loans; and that no premium taken by any association governed by the act shall be treated as interest, or render the association amenable to the laws of usury, the "rate of premium" on loans is not the same thing as the rate of interest thereon, but signifies a definite or fixed sum or amount agreed upon between the association and the borrower as a consideration upon which the loan or advancement is made; and a premium fixed by a rate per cent upon the amount of the loan, and dependent as to the time of its payment upon the time that the loan may remain unpaid, is not the definite or fixed sum contemplated by building and loan associations as a premium, but is a mere device to avoid the law of usury.

**BUILDING AND LOAN ASSOCIATIONS—LOAN TO BORROWING MEMBER—WHEN USURIOUS.**—If the owner of stock in a building and loan association borrows money of it, agreeing to pay a given rate of interest on the loan, and a "premium" at a stated per cent per annum on the face of the loan, payable during the life of the contract, such contract is usurious if the "premium" and the interest together exceed the lawful rate of interest on money.

**A FOREIGN BUILDING AND LOAN ASSOCIATION HAS DONE BUSINESS IN THIS STATE,** within the meaning of a statute prescribing conditions under which it may "do business" here, where it has loaned money in this state, through a local agent, has taken a note therefor, secured by a mortgage on land here, and has brought suit on the contract in the courts of this state.

**BUILDING AND LOAN ASSOCIATION—CONFLICT OF LAWS—CONTRACT OF THIS STATE—WHAT IS.**—A loan made in this state to a citizen thereof, by a foreign building and loan association, doing business here, which is secured by a mortgage upon land here, is a contract of this state, and must be construed and enforced according to its laws, notwithstanding a stipulation in the mortgage to the effect that it is a contract of another state.

**USURY—INTENT TO VIOLATE LAW—PROCEDURE.**—A **CORRUPT INTENT** is an element of usury in a contract for the loan of money, which means that the parties must have knowingly agreed upon a rate of interest greater than that allowed by law. Hence, where they have acted under an honest belief that the stipulated rate was recoverable under the law, in which they were mistaken, the penalties of usury will not be enforced, but the borrower will be charged with his loan at the legal rate, and will be credited with what he has paid on account thereof.

Suit by the Washington National Building, Loan, and Investment Association against Stanley and others to foreclose a mortgage on real estate. The plaintiff was a corporation of the state of Washington, and alleged its right to do business in the state of Oregon. Stanley and wife, of Seattle, Washington, who held stock in the plaintiff association, borrowed five hundred dollars of it, and gave their note therefor, promising to pay six per cent interest per annum and six per cent premium per annum, and agreeing to pay an attorney's fee in case of suit. A copy of the note was set out in the complaint, averring the ownership and nonpayment thereof; but the mortgage was not set up either by copy or exhibit, nor was the substance or pur-

port of its provisions stated. The complaint, however, did allege that the note was secured by a regularly recorded mortgage upon certain described land in Polk county, Oregon. It was also alleged in the complaint that the shares of stock referred to in the mortgage, and which had been transferred and pledged to the payee as collateral security, were of no value whatever. The plaintiff prayed for a foreclosure, and a cancellation of the defendant's stock. The defendants denied that the plaintiff had complied with the laws of Oregon, enabling it to do business in that state; denied that the contract was made or executed in Washington; and denied any indebtedness to the plaintiff. As a separate defense it was alleged that no "rate of premium" was fixed by the plaintiff's by-laws, as required by law; that the agreement to pay a premium of six per cent per annum, in the manner specified in the note, was illegal and void; that the note and mortgage were executed and delivered in Polk county, Oregon, and that the note was made and delivered upon a usurious agreement between the association and the borrowers. The reply denied the material allegations of the answer and asserted the right of the corporation to do business in Oregon. The suit was dismissed and the plaintiff appealed.

Guy G. Willis and Fred L. Keenan, for the appellant.

J. L. Collins, R. P. Boise, and Raleigh Scott, for the respondents.

**326** WOLVERTON, J. 1. One of the grounds upon which the dismissal was based is that the complaint does not state facts sufficient to constitute a cause of suit. Such insufficiency was not suggested by the defense, but was so found by the court upon its own motion, and is urged here as a correct holding in the premises. The specific objection to the complaint is that it has neither set up the mortgage by copy or exhibit, nor stated the substance or purport of its provisions, and that, therefore, the court cannot determine what are its conditions, or whether or not they, or any of them, have been broken so as to entitle the plaintiff to a foreclosure. The question not having been raised until after joining issue, all intendments must be taken in favor of the complaint. If it shows a good cause of suit, though defectively stated, it will support a decree and ought to be allowed to stand, at this stage of the proceedings. But if it has omitted an allegation material and necessary to



a maintenance of the suit, then it must be held insufficient: *Booth v. Moody*, 30 Or. 222, 46 Pac. 884. It must be admitted that the pleading contains but a meager statement of the plaintiff's cause, which, if tested by demurrer, could not be sustained; but, under the circumstances, we are inclined to think that it will support a decree. It was <sup>327</sup> evidently patterned after one of the forms contained in 2 *Estee on Pleadings and Practice*, second edition, 265, form 450. This court has held a complaint in like form good against a collateral attack: *Berry v. King*, 15 Or. 165, 13 Pac. 772. It is there said by Mr. Chief Justice Lord, that "it may be well doubted whether the allegation complained of is insufficient in the particular noted." While that case is perhaps not authority here, as the question has arisen in a direct proceeding, yet, giving the plaintiff advantage of all intendments, the complaint must be held to state a cause of suit.

2. The articles of incorporation appear to have been executed and acknowledged by only six persons, instead of ten, as required by the statute of Washington in the organization of such an association, and the defendants challenge the plaintiff's corporate capacity to enforce its obligations, because the law has not been complied with in the particular suggested; but the association having apparently and in good faith attempted to comply with the law governing the organization, and the defendants being borrowers of the concern, and having received and accepted its stock and dealt with it in its corporate capacity, they cannot now be heard to question its entity. The association is, at least, a *de facto* corporation, and may maintain suits and actions against those who have dealt with it to enforce their obligations, and the state only can complain of its defective organization. "When a body of men are acting as a corporation under color of apparent organization, in pursuance of some charter or enabling act, their legal authority to act as a corporation cannot be questioned collaterally": *Taylor on Private Corporations*, 4th ed., sec. 145. So that, if there has been an apparent attempt to perfect an organization under the law, and there has been user in pursuance of such an attempt, the organization has acquired a *de facto* existence, which will enable it to maintain its individuality against all attacks that may arise collaterally: *Finnegan v. Noerenberg*, 52 Minn. 239, 38 Am. <sup>328</sup> St. Rep. 552, 53 N. W. 1150. And this rule is applicable to building and loan associations, as well as private corporations generally:

Payette v. Free Home Assn., 27 Ill. App. 307; Hagerman v. Ohio etc. Sav. Assn., 25 Ohio St. 186.

3. It is further insisted that the plaintiff has not complied with the requirements of our statute so as to entitle it to do business within this state. The act referred to (Laws 1895, p. 103) provides that no building and loan association organized under the laws of any other state shall do business herein, unless such association shall have securities of the value of one hundred thousand dollars; and that, before commencing to do business here, such association shall file with the secretary of state an authenticated copy of its charter or articles of incorporation and by-laws, a duly authenticated copy of a resolution adopted by the board of directors, appointing an attorney therefor, resident within this state, upon whom legal process may be served, and whose name and residence shall be stated therein, and an agreement that said association will pay any judgment that may be taken against it within sixty days after the final entry thereof, and a certificate of the authorized officer of such other state, showing that securities of the value of one hundred thousand dollars are on deposit with the proper officer or trust company, in trust for all the members and creditors of such association. It is further provided that every such association doing business in this state shall, on or before the first day of September of each year, deposit with the secretary of state a report of its affairs and operations for the year ending on the thirtieth day of June immediately preceding, which shall specify certain matters named in the act, and that thereupon, if the secretary of state is satisfied that it has complied with all the provisions of the act and is entitled to do business in this state, he shall issue his certificate, stating such compliance, and that it is entitled to do business accordingly, which certificate shall be in force for a period of one year, unless sooner rescinded. By stipulation of the parties, <sup>329</sup> the certificate of the Honorable H. R. Kincaid, secretary of state, bearing date August 29, 1895. only a few days prior to the date of the execution of the note and mortgage, was offered and admitted in evidence, subject to any valid objections thereto, showing that all the provisions of said act authorizing such associations to do business in this state had been complied with. No objections having been urged to the competency or relevancy of the certificate, we are of the opinion that it is adequate to establish, prima facie at least, the authority of the plaintiff to do business here. We will not at-

tempt, therefore, to make further inquiry as to what was in reality done by the association to the end that it might lawfully transact business in this state.

4. The mortgage recites that it is given to secure a loan upon five shares of stock, the monthly payments on which, amounting to three dollars and twenty-five cents, the mortgagors covenant and agree to make until said stock becomes fully paid up; and the conditions thereof are that if the mortgagors shall well and truly pay, or cause to be paid, to the association, at its home office at Seattle, Washington, the sum of five hundred dollars, according to the conditions of the promissory note set out therein, with interest before and after maturity at the rate of six per cent per annum until paid, payable monthly, and a premium at the rate of six per cent per annum, payable at the same time and in the same manner as the interest, or shall pay, or cause to be paid, at the home office, all installments of interest and premium which become due on such stock until it becomes fully paid, and before any of said installments shall have been past due a period of six months, and shall surrender such stock in payment of the note, then said mortgage to become void, otherwise to be and remain in full force and effect. The stipulated facts show that the plaintiff, by resolution of its board of directors, appointed Guy G. Willis, of Portland, Oregon, its attorney for the state of Oregon, upon whom legal process might be served, to hold until another should be appointed 330 to succeed him; that the defendants Stanley were not in the state of Washington on the 2d of September, 1895, when said note and mortgage were signed, acknowledged, and delivered; that on the 7th of August preceding the defendant H. B. Stanley made application to the plaintiff for a loan, and at the same time applied in writing for ten shares of stock in the association; that plaintiff issued to Stanley its certificate for ten shares of stock, and at the date of execution of the note and mortgage he redelivered the same to plaintiff as collateral security for the loan; that said application for a loan and stock was made at Dallas, Oregon, through one W. G. Wright, who represented that plaintiff had money for such investment, and the note and mortgage were there executed, acknowledged, and delivered to the plaintiff. The mortgage, however, contains a provision that it is understood to be made with reference to and under the laws of the state of Washington.

This brings us to the pivotal, and most difficult, question in the case, which is whether the note and mortgage, which



must be construed together as one instrument, are tainted with usury. For a proper determination thereof, very much depends upon the precise nature and purpose of a building and loan or savings and loan association. The title of the act granting special and peculiar privileges to such organizations in this state is, "To regulate the incorporation and business of building and loan and savings and loan associations doing a general business": Laws 1895, p. 103. There is no distinction between a building and loan and savings and loan association, and the two appellations were used to designate but one class of societies, viz., those doing a savings and loan or investment business on the building society plan. Associations of this kind enable persons belonging to a deserving class, whose earnings are small, and with whom the slowness of accumulation discourages the effort, by the process of gradual and enforced savings to become either at <sup>331</sup> the end of a certain period, or by anticipation of it, the owners of homesteads. It is by reason of the peculiar character of this particular class of associations, and because of their capability, when conducted upon the plan which essentially distinguishes them from other organizations and business enterprises, that they have acquired, under the law, distinct and peculiar rights and privileges. The act was designed, therefore, to encourage and extend the particular privileges therein designated to this peculiar class of organizations. None other can claim the benefits and immunities accorded them, and these only when they pursue the especial business, and observe the exceptional rules, which characterize them and make them peculiar, as compared with other business enterprises.

A building association, as now existing, is defined by Thompson as "a private corporation designed for the accumulation, by the members, of their money, by periodical payments into its treasury, to be invested from time to time in loans to the members, upon real estate for home purposes, the borrowing members paying interest, and a preference in securing loans over other members, and continuing their fixed periodical installments in addition; all of which payments, together with the nonborrower's payments, including fines for failure to pay such fixed installments, forfeitures for such continued failure of such payments, fees for transferring stock, membership fees required upon the entrance of the member into the society, and such other revenues, go into the common fund until such time as that the installment payments and profits aggregate the

face value of all the shares in the association, when the assets, after the payment of the expenses and losses, are prorated among all the members, which, in legal effect, cancels the borrower's debt and gives the nonborrower the amount of his stock": Thompson on Building Associations, 2d ed., sec. 3. Mr. Endlich defines such association as a "private corporation, erected for such <sup>332</sup> a period of time as may be permitted by the laws under which it is incorporated, for the accumulation, from fixed periodical contributions of its shareholders and the profits upon their investment, of a fund to be applied, from time to time, in accommodating such shareholders with loans or advancements, for the purpose, primarily, of acquiring the free possession of real estate, and constructing dwellings, under terms and regulations sanctioned by experience, and prescribed by legislation, and the charter and by-laws of the association, upon principles of strict mutuality and equality of benefits and obligations, with the effect of gradually extinguishing the liability incurred from such loans and advancements simultaneously with the prescribed continuance of the shareholder's periodical contributions upon the stock held by him in the association; the said periodical contributions being so calculated as to amount, in the aggregate, at compound interest, to the par value of all the shares, as agreed upon at the formation of the society and fixed by its charter, within the period allowed for the anticipated duration of the society, or the continuance of the contributions, after deduction of all the necessary expenses of the business": Endlich on Building Associations, sec. 39. See, also, *State v. Redwood Falls etc. Assn.*, 45 Minn. 154, 47 N. W. 540.

The societies in this country were first organized under the plan evolved in England. Lord Chancellor Cranworth, describing their operations in that country under the provisions of act 6 & 7 William IV, chapter 32, sections 1, 3-5, says: "Members subscribe monthly sums, which are accumulated till the fund is sufficient to give a stipulated sum to each member, and then the whole is divided among them. In the society now in question the sum to be raised for each member is one hundred pounds. If this were all, it would be a very simple transaction—mere accumulation—and the only question would be how to invest the sums subscribed to the greatest advantage. <sup>333</sup> But this is not all. One main object is to enable members to obtain their one hundred pounds by anticipation on their allowing a large discount. For this purpose, when a sufficient

fund is in the hands of the treasurer, the members who desire to get their shares in advance bid, by a sort of auction, the sum which they are ready to allow as discount, and the highest bidder obtains the advance. Thus, if at the end of a year a sum of five hundred pounds is in the hands of the treasurer arising from the monthly subscriptions, and the holder of ten shares is willing to allow a discount of fifty per cent (no one offering more), the five hundred pounds is or may be advanced to him, being fifty pounds in satisfaction of each of his ten shares. For this accommodation he is bound to pay monthly, till a fund is raised sufficient to give one hundred pounds per share to all the other members, not only the original monthly subscription, but also a further monthly sum, called 'redemption money': *Fleming v. Self*, 3 De Gex, M. & G. 997, 1012. For a more extended and very lucid explanation of the manner of carrying on the business of these societies, see Endlich on Building Associations, section 8 et seq. Societies of this description, working under the plan thus defined and outlined, are such as the legislature had in view when the act was passed authorizing their incorporation, and extending to them peculiar privileges withheld from other business enterprises.

Among these privileges is one by which a certain premium may be taken from the borrower for the right of securing a loan from the organization, without entailing the consequences of practicing usury. Let us now inquire touching the nature of the premium peculiar to this class of associations. As understood by text-writers, it is a "bonus charged to a stockholder wishing to borrow, for the privilege of anticipating the ultimate value of his stock by obtaining the immediate use of the money his stock will be worth at the winding up": Wrigley's "The Workingman's Way to Wealth," 67. After quoting Wrigley's definition, <sup>334</sup> Mr. Endlich observes that, "in effect, it is the conventional difference between the par value of the share advanced and the amount actually received by the borrower": Endlich on Building Associations, sec. 388. Messrs. Thornton and Blackledge define it as "the amount which a stockholder, desiring to borrow, is willing to pay for the privilege of anticipating the ultimate value of his stock, by obtaining at once the use of the amount of money his stock will be worth when the association is wound up": Thornton and Blackledge on Building and Loan Associations, sec. 222. "It is the difference," says Wood, J., in *Sullivan v. Building etc. Assn.*, 70 Miss. 94, 12 South. 590, "estimated by the association and its borrowing



member, between the par value of the member's shares of stock and their present real value. It is the bonus which appellant might lawfully agree to pay for a present advancement in cash of a sum certain for the virtual transfer to the association of his shares of stock, which, in the final winding up of its affairs, may realize the sum actually received by the member, together with the premium bid, or which may not." Mr. Justice Cooper, in *Paterson v. Workingmen's etc. Assn.*, 14 Lea, 677, 687, after giving briefly the history of those associations and the manner of their operation, says: "For the advance upon the dividends by way of anticipation, and the amount which the member was willing to give out of the final dividend for the preference of an advance, the words 'loan' and 'premium' or 'bonus' were used." Speaking interchangeably of the nature of the transaction and the consideration for the preference, Green, J., in *Pfeister v. Wheeling etc. Assn.*, 19 W. Va. 676, 686, says: "Having no English word to express accurately this abatement, they might have called it, as they did, 'the premium bid for the right of precedence in taking the loan.' And there being no appropriate word to represent this transaction, it would naturally come to be called by various names, which, with more or less accuracy, would in a word <sup>335</sup> or brief phrase give an idea of it. Some might call it a 'redemption of his interest in the association,' as the ultimate effect of it would be that he would, at the close of the association, get no money from it, because what would be otherwise coming to him would be absorbed by the payment of his note, and this abatement he had agreed to, or his 'premium,' as it is generally called. Sometimes it would be called for the like reason, but with still more inaccuracy, 'a purchase of all his interest in the association, by the association.' And as the loan is really to be ultimately paid by offsetting his interest in the association against this note to the association, it would sometimes, with much more accuracy, be called 'a loan on his interest in the association.'" And again, in *Mutual Sav. Assn. v. Wilcox*, 24 Conn. 147, in speaking of the term "bonus," as used in the statute, the court say: "By that expression we think that they meant something definite; something distinct, and independent of the interest, in the ordinary acceptance of the term; . . . a definite sum for a loan for a specified time, and not anything which the parties in their contract might choose to denominate a bonus."

It is fairly deducible from these authorities that the significance of the term "premium," within the meaning of the law

of building and loan associations, is a bonus in reality, or a definite fixed sum or amount agreed upon between the contracting parties—the association and the borrower. Representing, as it does, the conventional difference between the par value of the share advanced and the amount actually received by the borrower, it is susceptible, in theory, at least, of definite and exact ascertainment, and it is a part and purpose of the scheme that it should be so determined and settled at the outset, and stand for the consideration upon which the loan or advancement is made. The usual method, and the most satisfactory and equitable way, of arriving at the premium to be paid for the privilege <sup>336</sup> of obtaining the advancement, is by a bidding between the members wanting the accumulated funds; the highest bid, or the one offering the largest premium or bonus, taking the funds to the amount desired. By this method the amount of the premium is ascertained, and becomes a lump sum, to be paid to, or, rather, to be retained by, the association from the borrower for his privilege of being preferred over other members desiring the use of the funds of the association. It would seem that the practice of charging “fixed premiums”—that is, premiums prescribed by the by-laws of the association or the board of directors, and not determined by competitive bidding—has become prevalent to some extent among “national” associations: Thompson on Building Associations, 2d ed., sec. 191. But the author of this work cites no case where the practice has been upheld, while many are referred to which condemn it as violative of one of the distinctive and most salutary principles characterizing these peculiar associations, which is that the money should be put up for sale, usually denominated “auction,” and the highest bid fixes the amount of the premium, and determines, as between members, who shall obtain the loan: Vermont etc. Co. v. Whithead, 2 N. Dak. 82, 49 N. W. 318; Butler v. Mutual Aid Co., 94 Ga. 562, 20 S. E. 101; State v. Building Assn., 35 Ohio St. 258; Bates v. People’s Assn., 42 Ohio St. 655; Brown v. Archer, 62 Mo. App. 277; Meroney v. Atlanta etc. Assn., 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924; Boone v. Homestead Loan Assn., 23 N. Y. Supp. 203; McCauley v. Workingmen’s etc. Assn., 97 Tenn. 421, 56 Am. St. Rep. 813, 35 L. R. A. 244, 37 S. W. 212. In a foot-note to the last case cited, Mr. Burdett A. Rich, one of the annotators of those valuable reports, the L. R. A. series, makes this observation: “In America the reported cases which have discussed the matter all seem to con-

demn fixed premiums, or any rule to limit the usual scheme of free bidding."

<sup>337</sup> These loans, where upheld as not usurious, when the premium, added to the redemption money or interest, exceeds the lawful rate of interest, are supported upon the ground that the transaction is not, in all of its essentials, a loan, but an anticipatory advancement, by way of discount, of the share the member would otherwise be entitled to claim payment of on the termination of the society, coupled with the idea that it is a dealing with what is virtually a copartnership fund, or one in which all the members, including the borrower, are mutually interested: *Seagrave v. Pope*, 1 De Gex, M. & G. 783; *Silver v. Barnes*, 8 Scott, 300. This is, in brief, the rationale of the English doctrine, which has been adopted by many of the states of the Union: *Hoboken Bldg. Assn. v. Martin*, 13 N. J. Eq. 427; *Clarksville etc. Assn. v. Stephens*, 26 N. J. Eq. 351; *McLaughlin v. Citizens' etc. Assn.*, 62 Ind. 264; *American Homestead Co. v. Linigan*, 46 La. Ann. 1118, 15 South. 369; *Robertson v. American Homestead Assn.*, 10 Md. 397, 69 Am. Dec. 145; *Massey v. Building Assn.*, 22 Kan. 624; *Sullivan v. Building etc. Assn.*, 70 Miss. 94, 12 South. 590; *Merrill v. McIntire*, 13 Gray, 157; *Tilley v. American etc. Assn.*, 52 Fed. 618; *Holmes v. Smythe*, 100 Ill. 413; *Central etc. Assn. v. Lampson*, 60 Minn. 422, 62 N. W. 544; *Winchester Bldg. Assn. v. Gilbert*, 23 Gratt. 787.

Our statute prescribes (Laws 1895, p. 103, sec. 4) that the association shall adopt by-laws, which, among other things, shall "especially provide for the character and methods of conducting the business of the association, with rules governing the admission of members, the sale of its shares, the amount of admission fee, the amount of and the periods when dues shall be paid by the members to the association, the disposition and investment of the funds of the association, including loans, the amount of premiums to be paid for, <sup>338</sup> and the rate of interest on, loans," etc.; and section 6, that the by-laws shall provide for the mode in which the application or bids for loans shall be made and received, and who shall be entitled to preference in allotting the same, but it contains a proviso as follows: "That the provisions of this section, relating to bidding for loans, shall not apply to associations which fix the rate of interest and premium in its by-laws or annually, by resolution of the board of directors, at a rate which will keep the money of such association at all times safely invested, and in which the system of bidding is not allowed. The minimum amount and nature of



premiums to be bid or asked for loans shall be fixed and described in the by-laws, but the same may from time to time be changed by a two-thirds vote of all the members of the board of directors." Section 7 provides that "any premium which has heretofore or which shall hereafter be taken for loans . . . made by any association governed by this act, shall not be considered or treated as interest, nor render such association amenable to the laws relating to usury." Does this statute permit the taking of a rate of premium such as is stated in the obligation set out in the complaint, which the plaintiff seeks to foreclose? Section 4 requires the by-laws to provide for the amount of the premium to be paid for, and the rate of interest on, loans. This obviously treats the premium as something different in character from interest, and is in perfect accord with another provision to be contained in the by-laws, prescribing the mode by which bids for loans shall be made, obtained, and received; for, when the two are observed, the amount of the premium becomes definitely fixed and determined, and in that respect is well distinguished from the interest.

But when we come to the proviso of section 6, above noted, the intendment of the legislature is not so clear. It may be conceded, for the purposes of this case—but we must by no means be understood as deciding it—that it <sup>339</sup> would be legitimate for the association, through its by-laws or by resolution of its board of directors, to prescribe a minimum lump premium, or name a certain or definite amount per share to be paid as a premium, upon a loan or advancement to be made; but even this could not be held to authorize the fixing of a premium by a rate per cent or by a percentage upon the amount of the loan, and dependent for the time of its continued payment upon the length of time the loan may remain unpaid, or the stock of the borrower be not fully paid in. There is nothing in such a condition to distinguish it from interest, and the legislature surely did not intend to say that interest shall not be treated as interest, or that interest, to be collected by the designation of premium, shall not be treated as interest. So that when the statute speaks of the rate of premium, it does not mean the same thing as the rate of interest. The more natural and consistent interpretation would be that, when the legislature speaks of a rate of premium, it means a proportional or pro rata distribution of the payment of a premium, fixed by the by-laws or by resolution of the board of directors of the association. If it does not have this meaning, it has no other that will distinguish

it from interest, and the act cannot be held to sanction the taking of any premium at all under the appellation of "rate of premium." The idea of a rate of premium corresponding to rate of interest is not within the spirit and intendment of the law of building associations, and, if that is what was attempted to be sanctioned by legislative edict, so as to relieve it from amenability to the laws relating to usury, it would be very questionable whether it could secure the warrant of the constitution, which inhibits the adoption of any special or local law relating to interest on money. Under this interpretation of the act it is plain that the plaintiff was not warranted in exacting from the borrower the six per cent premium upon the amount of the loan, as, when added to the six per cent <sup>340</sup> interest, it exceeds the lawful rate which is permitted to be charged in this state as interest on money. The device has the characteristic of a shift to circumvent and avoid the law relating to usury, and cannot receive our sanction. *Meroney v. Atlanta etc. Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924, was a case where three dollars and twenty-five cents per month, as interest and premium, was contracted to be paid upon a loan of three hundred dollars, and it was held that the whole transaction could not be characterized otherwise than as "a lending of three hundred dollars to the plaintiff at twelve per cent per annum." So it was said, in *Butler v. Mutual Aid Co.*, 94 Ga. 562, 20 S. E. 101: "It [the association] claims to loan money at six per cent per annum, payable and collectible monthly; but under the name of premium, which is but another name for usury, collects another six per cent monthly, by such device collecting really twelve per cent interest per annum, payable monthly, on loans; thus, under fancy names, carefully eschewing the name of interest, which said charges really are, and, with the object and intent to do so, contracting to take and collect a higher rate of interest than that allowed by law." These cases illustrate the principle adopted, and it would seem that plaintiff's contract is usurious upon its face.

5. The plaintiff contends, however, that the agreement must be treated as a Washington contract, and therefore should be construed with reference to the usury laws of that state, and, incidentally, that the transaction of making the loan, and taking a note payable at Seattle, Washington, and a mortgage upon lands in Oregon, to secure its payment, was not doing business within this state. It is strange reasoning to insist, on the one hand, that, in order to enable the plaintiff to sue in our courts,

it has complied with the law with that particularity which will enable it to do business in the state, and yet, when it is suggested that it has violated the laws of usury here by a transaction consummated under the same authority that authorizes the suit, to insist that it has not <sup>341</sup> done business within the state. The very purpose of the act is to enable those associations having their domiciles in other states to do and transact business and sue and be sued here, and it ought to be alike effective under all conditions. When they come here under the statute, and have the license of the secretary of state to do business here, they become pro hac vice domestic corporations, and must operate as if actually domiciled in the state. They submit and render themselves amenable to the laws of the state, which must be taken to govern all their transactions entered into and consummated therein. Our own citizens would not be permitted to make contracts here payable in another state, and then insist upon having them construed here according to the laws of such state; and it does not seem consistent with principle and reason that a foreign corporation, securing citizenship in this state for the purpose of promoting its business, can insist upon making its contracts payable elsewhere, and then invoke the authority and process of our courts to enforce them according to laws other than our own. If such were to be recognized as good law, it would in many instances give foreign corporations, although domiciled in this state, advantages over those organized under its laws, and having their principal place of business here. But the transaction, under the conditions attending it, must be regarded as doing business within this state: *Bank of British Columbia v. Page*, 6 Or. 431; *Hacheny v. Leary*, 12 Or. 40, 7 Pac. 329; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. Rep. 739.

6. The contract was made in Oregon, and must be construed and enforced according to our laws. The application for stock and the loan was made in Oregon, to and by an association domiciled and doing business therein, through a resident solicitor. The mortgage was given upon an Oregon farm, and was executed and acknowledged here. The money was used here, and this suit was instituted in the county in <sup>342</sup> which the mortgaged premises are situated, as contemplated by the association when it acquired the license to do business in the state. All this, notwithstanding the mortgage stipulation to the effect that it is a Washington contract, clearly shows its Oregon nativity, and it is therefore solvable by the laws thereof. *Meroney v.*



Atlanta etc. Assn., 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924; Martin v. Johnson, 84 Ga. 481, 10 S. E. 1092; Dickinson v. Edwards, 77 N. Y. 573, 33 Am. Rep. 671; Jackson v. American Mtg. Co., 88 Ga. 756, 15 S. E. 812.

7. But notwithstanding the contract appears to be usurious on its face, and the natural inference to be drawn therefrom is that the parties intended the result of their own acts, yet there is another element which must attend the practice of usury. It must be with a corrupt intent, which means that the parties must have knowingly agreed upon a rate of interest greater than that allowed by law: 27 Am. & Eng. Ency. of Law, 1st ed., 925; Balfour v. Davis, 14 Or. 47, 12 Pac. 89; Burwell v. Burgwyn, 100 N. C. 389, 6 S. E. 409. But where they have acted under an honest belief that the stipulated rate was recoverable under the law, in which they were mistaken, it has been held that the penalties of usury would not be enforced: Thompson v. Jones, 1 Stew. 556. There is no evidence in this case, aside from that which appears upon the face of the contract, by which we are or can be advised as to the true intent of these parties. Hence we may fairly suppose that they in good faith designed to act within the legislative intendment of the act governing the management and conduct of building and loan associations, and as the provisions governing in the premises are, as we have seen, of doubtful import, in view of the rule that forfeitures are never enforced except when the case is reasonably free from doubt, we have concluded to decree a foreclosure in favor of the plaintiff for the principal sum, with interest at the rate of six per cent per annum, against which <sup>343</sup> defendants will be allowed credit for the thirty-nine dollars paid upon the stock. Plaintiff should also have sixty dollars as an attorney's fee, being the amount found to be reasonable by the court below, and its costs and disbursements in both courts.

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In *Western Savings Co. v. Houston*, 38 Or. 377, 65 Pac. 611, Houston and wife owned four shares of the capital stock of the Home Building and Loan Company, a domestic corporation, the par value of each share being fixed at two hundred dollars. They borrowed eight hundred dollars of the company and gave their note for the amount, with interest at the rate of six per cent per annum. They secured the note by a mortgage upon certain land and assigned the shares as additional security. The note was payable at the maturity of the stock. In the mortgage, Houston and wife agreed to pay the principal and interest, as provided in the note, and also all assessments, dues, fees, installments, and fines

that should accrue under the by-laws of the company upon the said shares. The Western Loan and Savings Company, having become the owner of the note and mortgage, instituted a foreclosure suit and obtained a decree, but not being satisfied with the amount awarded, appealed therefrom. The by-laws of the company required borrowing members to assign their stock to the concern as additional security for loans, and required a borrowing member to pay, not only interest upon the amount of the loan at the rate of six per cent per annum, payable weekly, but, in addition thereto, a weekly premium upon each share of stock pledged or hypothecated as additional security for the loan until the same matured, the amount of which was fixed by a bidding for the loan among the members desiring to borrow. Houston and wife agreed to pay thirty cents a share premium per week, or seven and eight-tenths per cent per annum upon the loan; and the payment, or the rate per cent premium, like the interest, never ceased until the stock matured. The six per cent interest added to the seven and eight-tenths per cent premium, amounted to thirteen and eight-tenths per cent per annum, an amount largely above the legal rate of interest, namely ten per cent.

"This feature of the scheme," said Wolverton, J., in delivering the opinion of the court, "distinguishes the company from a legitimate building and loan association, and renders the transaction between the company and the borrower a loan merely, and the borrower is entitled to have all payments made, whether as premiums, dues, fines, or otherwise, credited as payments on the loan: *Hale v. Stenger*, 22 Wash. 699, 63 Pac. 554; *Hale v. Barker*, 129 Cal. 419, 62 Pac. 168; *Stevens v. Home Loan Assn.* (Idaho, Jan., 1898), 51 Pac. 986; *Fidelity Sav. Assn. v. Shea* (Idaho, Jan., 1899), 55 Pac. 1022; *Randall v. National Protective Union*, 42 Neb. 809, 60 N. W. 1019; *Strauss v. Carolina Bldg. etc. Assn.*, 117 N. C. 308, 53 Am. St. Rep. 585, 23 S. E. 450. The court below followed this rule, except that it considered the fines accumulated as penalties for failures in making prompt payments, and declined to give the defendants credit therefor; and this is as favorable to the appellant as it could ask under the law."

The learned justice adverted to the fact that the statute was adopted and designed for the regulation and protection of that particular class of societies and organizations known as "building and loan associations," and said: "An association having for its basis of operation a scheme foreign in any particular from that which characterizes building and loan associations proper cannot be classed with such associations, and therefore is without the pale of the law adopted for their government and protection." He could see no practical distinction or difference between a premium fixed by a rate per cent upon the amount of the loan, as in the principal case, and one which signifies a definite sum per share to be paid at stated periods while the loan continues in force, as in the case of which we are

making this note. Neither, he said, constitute the definite or fixed sum contemplated by building associations, while both depend for the amount which the borrower will finally pay for the use of the money, upon the amount he has borrowed and the time the loan shall continue in force.

"It is urged by counsel for appellant," he said, "that the scheme of the Home Building and Loan Company contemplated that the loan should continue until the weekly dues, at the rate of twenty-five cents per share, should equal the principal of the loan, which would require fifteen years and twenty weeks; that if, at the end of that time, the accumulated dividends standing to the credit of the borrower, estimated at ten per cent per annum, upon the dues paid in, is deducted from the aggregate of the interest and premium, the result would show an average annual rate of interest less than the legal rate; consequently, the loan is not usurious. The idea that the loan should continue in force for that length of time is not deducible from the by-laws of the company. These seem to represent that the stock would mature between eight and ten years, and the dividend is a matter dependent wholly upon the earnings of the company, and it is largely speculative; so there is no foundation in fact upon which to base the proposition. The defendants paid upon this loan of eight hundred dollars something like five hundred and eighty-seven dollars, and a little over, during the six years that it ran prior to the time suit was instituted, which is admitted, and yet the appellant is asking for a decree for nine hundred and sixty dollars and ninety cents. There is something radically wrong in morals, as well as in law, with a scheme that produces such a result, and, of course, ought not to be upheld.

"The promoters of the company were perhaps fully conversant with the result that would follow the adoption of such a scheme, but we may safely assume that a great majority of the stockholders and borrowers of the company had no conception of its vicious character, and honestly and conscientiously invested their means and borrowed from the funds without thought of transgressing the law. Aside from this, we have no evidence touching the real intent of the parties to the transaction with respect to the usurious feature; hence, the penalty for practicing usury should not be visited upon the plaintiff: *Washington Inv. Assn. v. Stanley*, 38 Or. 319, ante, p. 793, 63 Pac. 489. The decree of the court below must therefore be affirmed."

The Validity of Articles of Incorporation cannot be inquired into incidentally and collaterally: *Pott v. Schmucker*, 84 Md. 535, 57 Am. St. Rep. 415, 36 Atl. 592; *Roane Iron Co. v. Wisconsin Trust Co.*, 99 Wis. 273, 67 Am. St. Rep. 856, 74 N. W. 818. If business has been done and corporate franchises exercised by an association of persons claiming to be a corporation and to be doing business as such, neither they nor the association will be permitted to question the corporate existence for the purpose of avoiding any contract entered into in the corporate name, nor of escaping any



liability which would exist if the act done in the corporate name had been authorized by the pre-existence of corporate capacity: See the monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 184.

**Usurious Transactions by Building and Loan Associations** are discussed in the monographic notes to *Bank of Newport v. Cook*, 46 Am. St. Rep. 200, 201; *Robertson v. American Homestead Assn.*, 69 Am. Dec. 160-162. See, also, *Johnson v. National etc. Loan Assn.*, 125 Ala. 465, 82 Am. St. Rep. 257, 28 South. 2. A transaction by which an association charges a borrowing member six per cent interest, and also a premium of six per cent, is not usurious, although the highest legal rate is eight per cent; but the association is required to give credit to the borrower for the amount of premiums paid as payment on the principal debt: *Pollock v. Carolina etc. Loan Assn.*, 51 S. C. 420, 64 Am. St. Rep. 683, 29 S. E. 77. Compare *McCauley v. Building etc. Assn.*, 97 Tenn. 421, 56 Am. St. Rep. 813, 37 S. W. 212; *Meroney v. Atlanta etc. Loan Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924.

CASES  
IN THE  
SUPREME COURT  
OF  
RHODE ISLAND.

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HUNT v. BARKER.

[22 R. I. 18, 46 Atl. 46.]

**DECEPTION RESPECTING THE TITLE TO REAL PROPERTY.**—Though the title to real property appears upon, and may be ascertained from an examination of, the public records of the county, an action may be maintained against one who knowingly misrepresents the condition of such title to another, who, in ignorance of the title, relies upon such representation to his injury.

Trespass upon the case for deceit, heard on exceptions of the defendant to the rulings of the district court.

Terence M. O'Reilly, for the plaintiff.

John H. Flanagan, for the defendant.

**19 MATTESON, C. J.** This is an action of the case for deceit, brought originally in the district court of the sixth judicial district, in which decision was rendered for the plaintiff, and is now before us on defendant's exceptions to the rulings of that court.

The bill of exceptions sets forth that at the trial in the district court evidence was adduced in behalf of the plaintiff that the defendant falsely represented to him that the defendant was the owner of certain real estate; that the plaintiff did not know who was the owner of it, and, relying on the defendant's representation, was induced to enter into a contract with the defendant to furnish heating apparatus for a house situated on the real estate; that further evidence was introduced, in the form of certified copies of deeds, showing that on the date on which the defendant made the alleged false representation that

he was the owner of the real estate the title to it was in the defendant's wife, and that the deeds by which the real estate was conveyed to her had been recorded when the representation was made. The defendant requested the court to rule that the recording of the deeds of the real estate was constructive notice to the plaintiff as to who was the true owner of the real estate; but the court refused to so rule, whereupon the defendant excepted.

As an abstract proposition, that contained in the request was doubtless correct (R. I. Gen. Laws, cap. 202, sec. 7); but, though correct, the court below was not bound to make the ruling unless it was pertinent to the case. The question <sup>20</sup> therefore, presented by the exceptions is whether one to whom a representation is made as to the ownership of land, who does not know the representation to be untrue, and who, relying on its truth, has acted to his loss, is precluded from maintaining an action for the deceit because the true state of the title to the land might have been ascertained by him by an examination of the land records.

The defendant's contention is that, as the record affords constructive notice to all persons of the true state of the title, it is incumbent on him to whom such representation is made to consult the record, and that if he fails to do so he is guilty of negligence, and so cannot recover.

We do not think that this contention can be sustained. The cases relied on by defendant in support of it are not cases of constructive notice, but cases in which the representations made were affirmations of the seller of property as to quality, value, former offers, and the like, which involved not so much facts as matters of opinion and judgment, and which, as said in *Brown v. Castles*, 11 Cush. 348, it has always been understood the world over are to be distrusted. On such statements a person has no right to rely, and hence, if he acts upon them without inquiry and is deceived, he is without remedy unless he has been prevented from making inquiry by the fraudulent conduct of the other. Where, however, the representation is a statement amounting to the positive assertion of an existing fact, the person to whom it is made has a right to rely upon its truth, and, having the right to rely upon it, is not put to his inquiry; and, therefore, if the representation be untrue and he is deceived thereby to his injury, negligence which will preclude his recovery cannot be predicated on his failure to make the inquiry. In *Mead v. Bunn*, 32 N. Y. 280, the court remarks: "Every



contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate or verify statements to the truth of <sup>21</sup> which the other party to the contract, with full means of knowledge, has deliberately pledged his faith."

Accordingly, it was held in *David v. Park*, 103 Mass. 501, that a distinct statement of fact by a seller known to be false, with intent to deceive the buyer, on which the buyer acts to his injury, will sustain an action of deceit, even if the buyer might have discovered the fraud by searching the records of the patent office. So, too, it was held in *Dodge v. Pope*, 93 Ind. 481, that one who represents that a mortgage which he offers for sale is the only mortgage of record is bound by such representation, although an examination of the record would have disclosed the existence of a prior mortgage. See, also, to the same effect, *Tyner v. Cotter*, 67 Wis. 482, 30 N. W. 782; *Evans v. Forstall*, 58 Miss. 30; *Fargo Gas etc. Co. v. Fargo Gas etc. Co.*, 4 N. Dak. 219, 59 N. W. 1066, in which the question is fully considered and numerous cases are collected. And see, further, *Ward v. Wiman*, 17 Wend. 193, in which it is held that case lies for deceitful and false representations respecting the title to land in the sale of it, and this, too, though the deed contains covenants of title, the purchaser having the right to treat the deed as a nullity and maintain his action for deceit.

We find no errors in the rulings of the district court upon the demurrer, which are also excepted to.

Exceptions overruled, and case remitted to the district court with direction to enter judgment for the plaintiff on its decision.

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**A Fraudulent Representation as to the Title of land renders the one making it responsible the same as if made in regard to something collateral:** *Culver v. Avery*, 7 Wend. 380, 22 Am. Dec. 586. When such representations are made by a vendor, they are grounds for the rescission of the contract of sale, although the title is of record: *Campbell v. Whittingham*, 5 J. J. Marsh. 96, 20 Am. Dec. 241. If he conceals defects in the title to land, which do not appear in the face of the title deeds, the vendee may either bring an action on the case, or file a bill in equity for relief: *Bryant v. Boothe*, 30 Ala. 311, 68 Am. Dec. 117.

## CROWELL v. PARKER.

[22 R. I. 51, 46 Atl. 35.]

**NEWSPAPER, WHAT IS NOT FOR THE PURPOSE OF PUBLISHING LEGAL NOTICES.**—"A real estate and rental guide," which, as its name imports, is taken up largely with transactions concerning real property and has never been employed as a medium for advertising notices of mortgage sales or other legal notices, is not such a newspaper as is contemplated by a power of sale contained in a mortgage of real estate, and a purchaser under a notice published in such guide will not be compelled to perform his contract.

Suit in equity for specific performance. A decree of bill dismissed was entered upon the pleadings, and the complainant appealed.

Cooke & Angell, for the appellant.

E. S. Hopkins, for the respondent.

**51** **MATTESON, C. J.** This is a bill for specific performance brought to compel the purchaser at a mortgage sale of real estate to take a deed to the property sold.

The only question raised is whether "The Real Estate Register and Rental Guide" is a public newspaper within the meaning of the power of sale in the mortgage. The powers of sale contained in mortgages of real estate in this state were framed many years ago, when the only newspapers were newspapers in the ordinary acceptation of the term, to wit, publications issued periodically, containing what is known as the general or current news, or news of the day **52** designed to be read by the public generally; or, in other words, for general circulation. These being the only publications in the form of newspapers, the practice grew up, and has continued, to publish notices of mortgage sales and legal notices generally in the ordinary newspapers for general circulation, and we think that publicity is more likely to be secured by such publication than by publication in a newspaper like the one in question, which is primarily devoted to the interests of a limited class of readers, and which, though taken up largely, as its name imports, with transactions concerning real estate, has never been employed, so far as appears, as a medium for advertising notices of mortgage sales or other legal notices, and which, for that reason, is not likely to be consulted by those interested in mortgage sales. Our opinion, therefore, is that it is not such a newspaper as

is contemplated by the power of sale, and hence that notice of the sale published in it was not a compliance with the power: *Beecher v. Stephens*, 25 Minn. 146.

In *Kerr v. Hitt*, 75 Ill. 51, *Railton v. Lauder*, 126 Ill. 219, 18 N. E. 555, *Maass v. Hess*, 140 Ill. 576, 29 N. E. 887, *Kellogg v. Carrico*, 47 Mo. 157, *Benkendorf v. Vincenz*, 52 Mo. 441, and *Lynch v. Durfee*, 101 Mich. 171, 45 Am. St. Rep. 404, 59 N. W. 409, to which our attention has been called by complainant's counsel, the newspapers, though devoted primarily to the interests of particular classes of readers, had either been extensively used for the publication of notices of sales and other legal notices, or were newspapers or had been found by lower courts to be newspapers of general circulation, in which respect they were unlike the newspaper under consideration. *Hull v. King*, 38 Minn. 349, 37 N. W. 792, also cited by complainant's counsel, apparently rested on the authority of the Illinois and Missouri cases referred to, although the publication in this last case was unlike those in the former, in that it did not appear to have been employed for the advertising of legal notices or to have been of general circulation. We do not deem it of sufficient authority for us to follow it.

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**Legal Notices.**—What are newspapers within the meaning of statutes providing for the publication of legal notices is discussed in *Lynch v. Judge of Probate*, 101 Mich. 171, 45 Am. St. Rep. 404, 59 N. W. 409; *Hanscom v. Meyer*, 60 Neb. 68, 83 Am. St. Rep. 507, 82 N. W. 114.

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### CONNOLLY v. DOLAN.

[22 R. I. 60, 46 Atl. 36.]

**A SURETY IS ENTITLED TO CONTRIBUTION FOR COSTS AND EXPENSES IN DEFENDING A SUIT, INCLUDING COUNSEL FEES, if the defense was prudent; and it must be so regarded when it greatly reduces the claim made against the surety.**

Bill in equity by one surety for contribution from another.

Samuel T. Douglas and Frederic A. Greene, for the complainant.

McGuinness & Doran and Arthur Cushing, for the respondents.

<sup>60</sup> **MATTESON, C. J.** This is a motion on behalf of Mabel Dolan, an infant respondent, to modify the decree here-



tofore entered in the cause. The complainant was cosurety with Michael Dolan, deceased, father of the infant respondent, in a probate bond. Subsequent to the decease of Michael Dolan, suit was brought on this bond against the complainant as the surviving cosurety, for the default of the principal. The complainant defended against the suit, and on his defense reduced the claim under the bond from two thousand six hundred dollars, or thereabouts, to fifteen hundred dollars, so that the estate of Michael Dolan, the deceased surety, was benefited by the defense to an amount upwards of five hundred dollars. The purpose of the motion is to reduce the amount awarded to the complainant by the decree to the extent of one hundred and thirty-six dollars and sixty-two cents, which represents one-half of the costs and counsel fees incurred by the complainant in the defense of the suit on the bond.

We do not think that the motion comes with good grace, in view of the benefit received by the estate of the deceased in consequence of the defense of the suit, and we see no reason for modifying the decree. The right of a surety to contribution for costs and expenses incurred in defending a suit depends on the question whether the defense was prudent. <sup>61</sup> If it was, the expenses of the defense may be recovered, and there seems to be no difference in principle between costs and counsel fees in this respect: *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. Dec. 98; *Davis v. Emerson*, 17 Me. 64; *Wagenseller v. Prettyman*, 7 Ill. App. 192; *Bright v. Lennon*, 83 N. C. 183; *Backus v. Coyne*, 45 Mich. 584, 8 N. W. 694; *Gross v. Davis*, 87 Tenn. 226, 10 Am. St. Rep. 635, 11 S. W. 92; *Van Winkle v. Johnson*, 11 Or. 469, 472, 50 Am. Rep. 495, 5 Pac. 922; *Brandt on Suretyship and Guaranty*, sec. 283. In view of the large reduction in the claim, it cannot be said that the complainant did not act prudently in making his defense.

In support of the motion it is contended that the respondent should not be held liable for costs and counsel fees, because these were no part of the contract obligation; that the contract of the sureties was with the obligee in the bond to pay the bond debt in case of default of the principal, and that it did not extend to the payment of costs or counsel fees, and hence that the doctrine of contribution ought not to be extended to embrace such costs and counsel fees. Several cases were cited to the effect that such expenses are not recoverable unless they had been authorized by the surety from whom recovery is sought, or were incurred in a suit to which such surety was a party. These

cases were *Knight v. Hughes*, 3 Car. & P. 467; *John v. Jones*, 16 Ala. 454; *Greely v. Dow*, 2 Met. 176; *Warner v. Morrison*, 3 Allen, 566; *Newcomb v. Gibson*, 127 Mass. 396; *Boardman v. Paige*, 11 N. H. 431; *Hayes v. Morrison*, 38 N. H. 90.

The right of contribution between sureties, it is conceded, does not depend on contract, but is an equity growing out of the relation based, perhaps, on an implied understanding that the burden created by the joint undertaking shall be equally borne and expressed in the maxim that, as between sureties, equality is equity. A part of the burden created by the joint undertaking, when it becomes necessary for a cosurety, who is sued alone, in the exercise of reasonable prudence to defend against the suit, is the expense of making his defense; that is, the costs and counsel fees necessarily and prudently incurred. Hence, if the sureties are to be put <sup>62</sup> on an equal footing, the surety not sued should be required to contribute his fair share of such expenses; otherwise there is no equality. For this reason we think the cases which allow the recovery of the expenses of suit, including costs and counsel fees, if prudently incurred, more consonant with equity and natural justice than the cases which hold to the contrary, and, therefore, founded on better reasons.

Motion denied.

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**A Surety is Entitled to Contribution for Costs and attorney's fees incurred with the consent of his cosureties in making a prudent defense for their common benefit:** *Gross v. Davis*, 87 Tenn. 226, 10 Am. St. Rep. 635, 11 S. W. 92.

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## STATE v. DALTON.

[22 R. I. 77, 46 Atl. 234.]

**THE POLICE POWER OF A STATE MAY BE DEFINED,** for all practical purposes, to be the power of the legislature to make such regulations relating to personal and property rights as look to the public health, public safety, and public morals. While this power is large, it is not without limit, and, like all other powers of the legislature, must be so exercised as not to violate the constitutional rights of the people.

**CONSTITUTIONAL LAW—POLICE POWER, EXERCISE OF. WHEN NOT SUSTAINABLE.**—When the validity of a statute is assailed and it is attempted to be sustained as an exercise of the police power, it is always open to the court to consider whether the act bears any reasonable relation to the public purpose sought

to be accomplished. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, nor impose unusual or unnecessary restrictions upon lawful occupations.

**CONSTITUTIONAL LAW.—IT IS ALWAYS TO BE PRESUMED** that all statutes are passed in the utmost good faith, and are conformable to the constitution, and it is not until the unconstitutionality of an act is plainly made to appear that the court is called upon to declare it void.

**A LOTTERY IS A SCHEME** for the distribution of prizes by chance.

**LOTTERY, WHAT IS NOT.—A METHOD OF DOING BUSINESS BY WHICH THE VENDOR OF ARTICLES GIVES THE PURCHASER** a stamp or other device which entitles him to obtain from some other person some article of merchandise in addition to that actually sold is not a lottery, and therefore cannot be forbidden by statute.

**CONSTITUTIONAL LAW—INTERFERENCE WITH LAWFUL BUSINESS.—A STATUTE** forbidding any person to sell, give away, or distribute any stamp, coupon, or other device which will enable a purchaser of property to demand or receive from another person any article of merchandise other than that actually sold to such purchaser, and further prohibiting any person other than a vendor from delivering to any person any article of merchandise other than that actually sold upon the presentation of any such stamp, coupon, or other device, violates the fourteenth amendment to the constitution of the United States and also section 10 of article 1 of the constitution of Rhode Island declaring that in all criminal prosecutions the accused shall not be deprived of life, liberty, or property unless by the law of the land.

**CONSTITUTIONAL LAW.—THE TERM "LIBERTY,"** as employed in the fourteenth amendment of the constitution of the United States, and in section 10 of article 1 of the constitution of Rhode Island, is not restricted to freedom from physical restraint, but embraces the right of each individual to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. This inalienable right is trespassed upon and impaired whenever the legislature prohibits one from carrying on his business in his own way, provided that business and the mode of carrying it on are not injurious to the public, and the business is not one affected with a public interest.

**CONSTITUTIONAL LAW.—TO WARRANT THE STATE IN ABSOLUTELY PROHIBITING A BUSINESS,** it is not sufficient that it is conducted by methods which do not meet general approval. There must be something in the methods employed which render it injurious to the public by demoralizing legitimate business, by introducing the element of chance, or by cheating and defrauding purchasers and others. It is not enough that it seriously interferes with, and even destroys, the business of others.

**CONSTITUTIONAL LAW.—THE GIVING OF A PREMIUM BY A VENDOR OF PROPERTY** to purchasers as an inducement for them to trade with him is a legitimate method of doing business which the state has not the power to prohibit.

Prosecution of the defendant for giving trading stamps in violation of chapter 652 of the Public Laws of Rhode Island.



Alexander L. Churchill, for the state.

Tillinghast & Murdock, for the defendant.

**78** TILLINGHAST, J. On the thirteenth day of November, 1899, the defendant was arraigned before the district court of the eighth judicial district upon a complaint and warrant charging "that on the twenty-eighth day of October, 1899, with force and arms, Benjamin Dalton, of Johnston, did sell to one Frederick W. Perkins certain articles of merchandise, to wit, three pieces of tobacco, and did then and there give and distribute to said Frederick W. Perkins three stamps commonly called trading stamps, which said stamps did then and there entitle the said Frederick W. Perkins to demand and receive certain articles of merchandise from Sperry & Hutchinson, at their store, said Sperry & Hutchinson being persons other than the vendor of said three pieces of tobacco."

The defendant filed a motion that the complaint be quashed for the following reasons: 1. Because chapter 652 of the Public Laws of the state of Rhode Island, and especially the first section thereof, on **79** which said complaint is founded, is in conflict with the first section of the fourteenth amendment to the constitution of the United States, because it deprives the defendant of his liberty and property without due process of law; 2. Because said chapter further conflicts with the first section of the fourteenth amendment to the constitution of the United States, because it deprives the defendant of the equal protection of the laws in this: That stamps or coupons redeemable in money and merchandise, or property given by the vendor as a bonus, in addition to the article purchased, are not included within the prohibition of the chapter; and 3. Because said act is in conflict with article 1, section 10 of the constitution of the state of Rhode Island.

This motion was overruled by the court. The defendant thereupon pleaded "not guilty," but was adjudged probably guilty, whereupon the case was certified to this court upon the question of the constitutionality of the act under which said complaint was made. Said act reads as follows:

"Section 1. It shall be unlawful for any person or corporation to sell, give, or distribute any stamp, coupon, or other device which shall entitle the purchaser of property to demand or receive from any person or corporation other than the vendor any article of merchandise other than that actually sold to said purchaser; and for any person or corporation other than the

vendor to deliver to any person any article of merchandise other than that actually sold upon presentation of any such stamp, coupon, or other device; provided, however, that this act shall not affect any existing contract.

"Sec. 2. Whoever shall violate any provision of this act shall be deemed guilty of a misdemeanor, and for each <sup>so</sup> offense shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for a term not exceeding three months."

It is contended on the part of the state that the act in question is sustainable as a valid exercise of the police power of the state, and also that the constitution of the United States does not limit the state in the exercise of such power.

It would be presumptuous for any court to attempt to formulate an exact definition of the term "the police power of the state." Legal definitions do not sum themselves up in single sentences. They are, and of necessity must be, more or less general and elastic in order that the courts may apply them to the infinite variety of circumstances which may arise in the relations and affairs of mankind in civilized society. But for all practical purposes the police power of the state may be shortly defined to be the power of the legislature to make such regulations relating to the personal and property rights as look to the public health, the public safety, and the public morals. In *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, it is referred to as the "power to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." Further and more elaborate definitions may be found in *State v. Fitzpatrick*, 16 R. I. 54, 11 Atl. 767; *Harrington v. Board of Aldermen*, 20 R. I. 233, 38 Atl. 1; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499; *Stone v. Mississippi*, 101 U. S. 818; *Commonwealth v. Alger*, 7 Cush. 53.

Under these general and comprehensive definitions it is evident that the general assembly is clothed with very large powers, and may exercise a broad discretion in the passage of laws pertaining to the internal affairs of the state. But while the power is large, it is not without limit, and, like all other powers of the general assembly, must be so exercised as not to violate the constitutional rights of the people. In *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343, the court, in referring to the police power, says that it "has never

been fully described, <sup>81</sup> nor its extent plainly limited further, at least, than this: It is not above the constitution, but is bounded by its provisions; and if any liberty or franchise is expressly protected by any constitutional provision, it cannot be destroyed by any valid exercise by the legislature or the executive of the police power": See, also, *In re Jacobs*, 98 N. Y. 107, 50 Am. Rep. 636; Guthrie on the Fourteenth Amendment, 76-89, and note by Professor Thayer; *Stehmeyer v. City Council* etc., 53 S. C. 259, 31 S. E. 322. Again, when the validity of a statute of this sort is under consideration, it is always open to the court to consider, amongst other things, whether the act bears any reasonable relation to the public purpose sought to be accomplished; and a forced or strained relation is not enough. Thus, in *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, Mr. Justice Brown, in delivering the opinion of the court, said: "To justify the state in thus interposing its authority in behalf of the public, it must appear: 1. That the interests of the public generally, as distinguished from those of a particular class, require such interference; and 2. That the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts": See *United States v. Ross*, 5 App. D. C. 249. And then, after instancing various enactments which have been held not to be within the police power of the states, the court further says: "In all these cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations, harmless in themselves, and which might be carried on without detriment to the public interests": See, also, *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29. Of course, it is always to be presumed that all acts of the general assembly are passed in the utmost good faith, and also that they are conformable <sup>82</sup> to the constitution: *Powell v. Pennsylvania*, 127 U. S. 678-685, 8 Sup. Ct. Rep. 992, 1257. And it is not until the unconstitutionality of a given act is plainly made to appear that the court is called upon to declare it void: *State v. District of Narragansett*, 16 R. I. 424, 16 Atl. 901; *Carr v. Brown*, 20 R. I.



215, 78 Am. St. Rep. 855, 38 Atl. 9. But after indulging every possible presumption and intendment in favor of the validity of a statute, and being unable to find that it can be sustained as a constitutional exercise of the legislative power, it becomes the duty of the court to declare it void: *Taylor v. Place*, 4 R. I. 324; *Carr v. Brown*, 20 R. I. 223, 78 Am. St. Rep. 855, 38 Atl. 9; *Mugler v. Kansas*, 123 U. S. 661, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. Rep. 862.

We come, then, to the question whether the act before us is one which falls within the police power of the legislature; for, if it is not, it is clearly an unlawful interference with private right. We will endeavor to test this question by the simple process of elimination.

First, then, does said act look to or in any manner concern the public health? No one claims that it does, and no one could for a moment claim, with any basis of reason, that it has or was intended to have even the remotest bearing thereon.

Second, does the act look to or tend to promote the public safety? Nothing of this sort either is claimed in its favor, and we fail to see that anything could be, for it bears no relation whatsoever thereto.

Having thus eliminated two of the general grounds upon which said act must be supported as being a valid exercise of the police power, we come to the third and last one, which raises the question whether the act relates to or tends to promote the public morals. The counsel in behalf of the state vigorously contends that it does, on the ground that it prohibits schemes which are in the nature of a lottery or gift enterprise, and hence, whether technically a lottery or not, are open to the same objection. He argues, substantially, that it is the element of chance, the hope of getting something for nothing, and the appeal to the gambling instinct that constitutes the evil of lottery transactions; that it is <sup>83</sup> clear that the scheme contemplated by the act and prohibited therein is in effect a lottery; and that, as an inducement to purchase, the promise of a premium to be given by a third person is held out and the precise nature of the premium and its value are unknown at the time of purchasing; and thus a subtle appeal is made to the gambling instinct, and, moreover, that a demoralizing element is introduced into legitimate business.

If this contention is well founded, the act in question is undoubtedly a valid and legitimate exercise of the police power. Is the method of doing business which is prohibited by the act,

then, in the nature of a lottery? A lottery is a scheme for the distribution of prizes by chance: *Governors of Almshouse v. American Art Union*, 7 N. Y. 228; *Thomas v. People*, 59 Ill. 160. Or, to state it with more fullness, "it is a scheme by which a result is reached by some action or means taken, in which result man's choice or will has no part, and which human reason, foresight, sagacity, or design cannot enable him to know or determine until the same has been accomplished": 2 *Bouvier's Law Dictionary*, 281; *People v. Elliott*, 74 Mich. 264, 16 Am. St. Rep. 640, 41 N. W. 916. The word "lottery" "embraces the elements of procuring, through lot or chance, by the investment of a sum of money or something of value, some greater amount of money or thing of greater value": *United States v. Wallis*, 58 Fed. 942.

The method of doing business which the act prohibits is the giving by the vendor, in connection with the sale by him, of any article or articles, of any stamp or other device which shall entitle the vendee to obtain from some other person some article of merchandise in addition to that actually sold.

It is to be observed that the act does not prohibit the vendor himself from giving or "throwing in," as it is sometimes termed in common parlance, some other article in addition to that sold, but only prohibits the seller from giving anything in the nature of a check or order upon some other person which shall entitle the holder thereof to obtain from such other person some article of merchandise in addition to the thing sold.<sup>84</sup> In other words, the act recognizes the right of a person to give away an article of merchandise in connection with, and as an inducement to, the making of a sale of some other article, but provides in effect that the giving of such additional article must be done by him directly and not through a third person. We fail to see that there is any substantial difference in principle between the two methods, or that either bears any resemblance to a lottery. The element of chance, which is the basal principle of every scheme in the nature of a lottery, is wholly wanting. To illustrate: A buys of B twenty pounds of sugar for a dollar, and is given with the purchase an order, check, stamp, token, or some kind of device—no matter what—which upon presentation to C entitles A to some other specific article of merchandise in addition to the sugar. How does such a transaction differ in principle from one where A receives the premium for making the purchase—for such it really is—directly from B himself? In other words, how is it changed into a

gambling transaction by the fact that the premium is received through the agency of C instead of being received directly from B? We cannot see that it is thus changed. The thing sought to be accomplished by the vendor is the sale of his goods by means of the inducement held out to the purchaser in the form of a premium; and if he may himself give and deliver the premium, as he clearly may, he may also give it through a third person.

As to the argument before referred to, that the scheme is in the nature of a lottery because the precise nature and value of the premium are unknown to the purchaser, it is enough to reply that nothing appears in the act or in the record before us to show this. The prohibition is that the purchaser shall not receive from any person other than the vendor "any article of merchandise other than that actually sold to said purchaser," thereby implying that the parties to the transaction would be dealing with reference to some particular article, or, at any rate, to some one of a given class of articles, in the possession of the third person, the nature and value of which were well understood.

<sup>85</sup> To illustrate again: A buys of B a suit of clothes for twenty dollars, and receives a check or stamp which entitles him to receive from C a pair of shoes worth two dollars, a hat worth two dollars, or a pair of gloves worth two dollars. It is true that A has not seen these articles at the time of purchasing the clothes, but as he knows that he is to receive one of the articles mentioned, as he may elect, we cannot see that there is anything so uncertain about the transaction as to appeal to the gambling instinct. At any rate, it does not in any real sense partake of the nature of a lottery. It is simply one of the infinite variety of devices which are resorted to by tradespeople in these days of sharp competition to promote the sale of their goods.

The complaint in the case before us expressly sets out that the stamps which were given by the defendant, in connection with the sale, entitled Perkins, the purchaser of the tobacco, to receive "certain articles of merchandise from Sperry & Hutchinson at their store," thereby showing by a fair inference, we think, that it was well understood between the parties to the transaction what the articles were.

It is to be further observed that the act does not prohibit the sale of merchandise and the giving in connection with, and as an inducement to, the purchase thereof of trading stamps redeemable in cash by a third person, nor does it prohibit the giving



of stamps redeemable by the vendor himself either in cash or merchandise; so that the use of trading stamps is not prohibited, but only limited. And it would seem that the legislature could not have considered the scheme which the act prohibits as being in the nature of a lottery, for if they had they would not have exempted the cash-stamp business from the operation of the law.

Referring again to the act in question, our view thereof may be stated thus: The act, as we construe it, prohibits a person from selling a given article, and at the same time and as a part of the transaction giving to the purchaser a stamp, coupon, or other device which will entitle him to receive from some third person some other well-defined article in addition to the one sold. This is equivalent to declaring <sup>86</sup> that it is illegal for a man to give away one article as a premium to the buyer for having purchased another. For, as already intimated, it can make no possible difference that the article given away with the sale is delivered to the purchaser by a third person instead of the seller himself. We think it is clear that such a prohibition is an unwarranted interference with the individual liberty which is guaranteed to every citizen, both by our state constitution and also by the fourteenth amendment to the constitution of the United States. The term "liberty," as used in the constitution, is a very broad and comprehensive one. It does not mean freedom from physical restraint simply, but embraces the right of each individual "to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare." In the terse language of Peckham, J., in *People v. Gillson*, 109 N. Y. 399, 4 Am. St. Rep. 465, 17 N. E. 345: "Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation": See, also, *Frorer v. People*, 141 Ill. 171, 31 N. E. 395; *Allgeyer v. Louisiana*, 165 U. S. 589, 590, 17 Sup. Ct. Rep. 427; *Guthrie on the Fourteenth Amendment*, 76-89, and note by Professor Thayer, 109. This inalienable right is trenched upon and impaired whenever the legislature prohibits a man from carrying on his business in his own way, provided always, of course, that the business and the mode of carrying it on are not injurious to the public, and provided, also, that it is not a

business which is affected with a public use or interest. Now, it was certainly within the constitutional right of the defendant in this case to sell tobacco—it being presumed, of course, that he had obtained the necessary authority to deal in that article—and, as an inducement to people to trade with him, it was also his right to give to each purchaser of a certain quantity of tobacco, either directly or through a third person, some other designated article of value by way of premium. The statute in question, however, steps in to prevent him <sup>87</sup> from adopting such a course to procure trade, and from it to secure an income and livelihood; and he is thus restrained in the free enjoyment of his faculties to which he is constitutionally entitled, unless such restraint is necessary for the common welfare in one of the ways heretofore mentioned, and we cannot see that it is. In other words, the statute says that A shall not sell to B a barrel of flour, and, in connection with and as a part of the contract of sale, give to B a coupon which will entitle him to receive from C a pound of tea, a pitcher, a lamp, a clock, a door-mat, or some other specified article of merchandise. If the act had prohibited the giving away of any stamp or device, in connection with the sale of an article, which would entitle the holder to receive, either directly from the vendor or indirectly through another person, some indefinite and undescribed article, the nature and value of which were unknown to the purchaser, there would then be introduced into the prohibited transaction enough of the element of uncertainty and chance to condemn it as being in the nature of a lottery.

But it is further argued in support of the statute that the scheme aimed at is one which is demoralizing to legitimate business, and hence within the police power of the state to prohibit. Just what is meant by this general characterization of the scheme is not clear. \*If, however, as we presume, the language is intended to refer to the methods employed by trading stamp companies in their dealings with merchants, as revealed in the *Lansburgh* case, *supra*, it is simply another way of saying that the scheme is a gift enterprise, partaking of the nature of a lottery, and hence may be prohibited by the state. But, as already intimated, we fail to see that, even conceding that the scheme which is sought to be prohibited may properly be denominated a gift enterprise, it partakes of the nature of a lottery, and hence is demoralizing to legitimate business in the sense of being a scheme to cheat and defraud purchasers. In other words, a gift enterprise is not necessarily a lottery: *Long v. State*, 74 Md. 565, 28 Am. St. Rep. 268, 22 Atl. 4.

In this connection it is pertinent to observe that it is not <sup>88</sup> enough to warrant the state in absolutely prohibiting a given business that it is conducted by methods which do not meet with general approval. There must be something in the methods employed which renders it injurious to the public in some one of the ways before mentioned, in order to warrant the state in interfering therewith. Nor is it enough to bring a given business within the prohibitory power of the state that it is so conducted as to seriously interfere with or even destroy the business of others. Take, for illustration, the great department stores in our large cities. By reason of the almost infinite variety of goods which they carry they furnish greater facilities to customers, and can offer them greater inducements in the way of trade than can those stores which carry but a single line of goods. The result is, as everybody knows, that very many small traders have been crushed out and obliged to abandon their business entirely, while the owners of the mammoth establishments which supply almost everything which we eat, drink, wear, use, need, or desire, whether useful or ornamental, are prosperous and successful in a remarkable degree. But while the result of this method of doing business is injurious to those who employ the more primitive one, can it be said that a law prohibiting a department store would be a valid exercise of the police power? Clearly not. A case decided no longer than December last holds that such a law is invalid. We refer to the case of *Chicago v. Netcher*, 183 Ill. 104, 75 Am. St. Rep. 93, 55 N. E. 707, in which it was held that an ordinance prohibiting a person, firm, or corporation from exposing for sale or selling any meat, fish, butter, or other provisions in any place of business in the city where drygoods, clothing, or drugs are sold tends in no way to protect the safety, health, or morals of the public, or to accomplish an object falling within the police power. It was also held that such an ordinance contravenes the provisions of both the constitution of the United States and of the state insuring to every person liberty and the protection of his property rights, and providing that he shall not be deprived of life, liberty, or property, without due <sup>89</sup> process of law. In *State v. Ashbrook*, 154 Mo. 375, 77 Am. St. Rep. 765, 55 S. W. 627, decided in February last, the supreme court of Missouri strongly condemns legislation which attempts to abridge or hamper the right of a citizen to pursue any lawful calling or avocation which he may choose without unreasonable regulation or molestation.



It may be demoralizing to legitimate business for two great rival drygoods houses to cut prices in the attempt to undersell each other, or for two competing railway lines to sell tickets at half price in the attempt of each to get an advantage over the other; yet probably no one would claim that such competition could be prohibited by law. "Bargain sales" and "bargain counters" may be demoralizing to business, but probably no one would claim that they can be abolished by law.

The invention of labor-saving machinery may be said to demoralize business, and so may numerous other modern innovations in manufacturing and industrial pursuits whereby old methods have to be abandoned and new ones adopted. But whatever demoralization results therefrom is incidental to that principle of evolution which is everywhere manifest in the mercantile and industrial, as well as in the physical, world. The great law of competition invites and promotes this sort of demoralization, and the remedy for one who is injured by it lies not in legislation, but in being able to keep pace with the changed, if not always improved, methods.

But it is further argued that the fact that a given scheme has an element of certainty does not operate to purge it of its taint as a lottery where the element of chance is present. And in support of this contention several cases are relied on, to which we will briefly refer. *Dunn v. People*, 40 Ill. 465, is widely different from the case at bar. There the evidence showed that the defendant, who was indicted under a statute making the vending of lottery tickets a penal offense, was conducting what he termed a "gift-sale" establishment; that he kept upon his desk a box filled with envelopes, upon each of which was printed an advertisement purporting that <sup>90</sup> it contained valuable recipes and popular songs, and also a card descriptive of some article in an "immense stock of over 250,000 pianos, watches, sewing-machines, jewelry, etc., worth \$1,500,000. All to be sold for one dollar each, without regard to value, and not to be paid for until you know what you are to receive." An advertisement was displayed at the store which gave a list of a great variety of articles, and stated that some of them were represented by the card in the envelope. A card might represent a grand piano or a finger ring, but whatever article the purchaser might find specified upon the card in the envelope bought by him he would be entitled to purchase for one dollar. The price of the envelope was twenty-five cents. It was strenuously argued by counsel for the plaintiff in error

that the sale of one of these envelopes with its contents was not the sale of a lottery ticket, because there was no element of chance in the transaction; that the card or ticket representing an article of merchandise to be bought for one dollar conferred simply a right to buy, which the holder could exercise or not at his option, and that if he bought he did so with his eyes open and with the opportunity of knowing the value of what he purchased. But the court held that while the element of chance did not lie in what the holder of the envelope might knowingly do with his card after he had purchased the envelope, it did lie in the purchase of the envelope itself, which, it was represented by the advertisement, might contain a ticket that would give him the right to buy for a dollar an article worth hundreds of dollars, or it might contain one which would only give him the right to buy something so valueless as not to be worth buying at any price. Such a scheme was very clearly a lottery within any of the definitions hereinbefore given. *Horner v. United States*, 147 U. S. 449, 13 Sup. Ct. Rep. 409, was also a case in which the element of certainty went hand in hand with the element of chance, and the court held that the former did not destroy the existence or effect of the latter. *Taylor v. Smetton*, 11 Q. B. 207, was a case where the defendant sold packets, each containing a pound of tea, <sup>91</sup> at two shillings six pence a packet. In each packet was a coupon entitling the purchaser to a prize, and this was publicly stated by the defendant before the sale, but the purchasers did not know until after the sale what prizes they were entitled to, and the prizes varied in character and value. It was held that the transaction amounted to a lottery under the statute of George III, chapter 119, section 2. In that case it clearly appears that the purchaser bought the tea coupled with the chance of getting something of value by way of a prize, but without any knowledge of what the prize might be. "In making his purchase," as said by the court, "he exercised no choice; what he got he got without any option or action of his own will, but as the result of mere chance or accident." In *Regina v. Harris*, 10 Cox C. C. 352, the element of chance was manifestly present. In *State v. Lumsden*, 89 N. C. 572, the defendant sold to customers small boxes of candy of trifling value for the chance or opportunity of designating one of certain pictures, conveniently arranged in his place of business, behind some of which were small sums of money and behind others a card on which was the title "C," the purchaser getting either the money

or the card, accordingly as he might select; but if he got a card he became entitled to another box of candy. This was held as undoubtedly it should have been, to constitute a lottery. *Lynch v. Rosenthal*, 144 Ind. 86, 55 Am. St. Rep. 168, 42 N. E. 1103, and *Davenport v. Ottawa*, 54 Kan. 711, 45 Am. St. Rep. 303, 39 Pac. 708, are cases where the element of chance is so manifestly present and controlling as to require no comment. *Lansburgh v. District of Columbia*, 11 App. D. C. 512, is more nearly in point than any of the others relied on in support of the act, but is not controlling. The statute under which that case was brought prohibited any gift enterprise in the District, and the court held that dealing in trading stamps in the manner shown by the evidence brought the acts of the defendant within the statutory definition of a gift enterprise. The court suggested, however, that it was possible that the statute might not be operative in a case where the sale of a lawful article was accompanied by a gift of something specific and <sup>92</sup> certain, not attended with any element of chance, and where the gift was not the real object of the sale, in an attempt to evade acts regulating or prohibiting a particular traffic. In so far as the opinion, which is a very vigorous one, condemns the trading stamp business it describes, we are not disposed to differ therefrom. *Humes v. Fort Smith*, 93 Fed. 857, holds that the state may provide that gift enterprises shall be licensed, or may, under the police power, prohibit them altogether. The case is similar to and follows the *Lansburgh* case, *supra*.

Amongst the cases to which we have been referred by defendant's counsel as supporting their contention that the transaction prohibited by the act is not in the nature of a lottery, those of *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343, *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916, and *Long v. State*, 74 Md. 565, 28 Am. St. Rep. 768, 22 Atl. 4, are most nearly in point, and on principle sustain the position we have taken.

Having thus come to the conclusion that the act cannot be sustained as being a valid exercise of the police power, it becomes unnecessary to consider the other point taken by the defendant—namely, that the act is obnoxious to the fourteenth amendment, as being class legislation.

In order that we may not be misunderstood in the position which we feel compelled to take regarding the case before us, we deem it proper to say that we do not approve of the trading stamp business, as some of the cases above referred to inform



us it is conducted, although there is no evidence before us concerning it, nor do we decide that it is not competent for the general assembly to prohibit it. What we do decide is that the statute in question is so broad as to interfere with the right of an individual to deal with his own property in his own way; that is to say, to make such contracts regarding the sale and disposition thereof as he shall see fit, so long as he observes the rule that each one shall so use and enjoy his own property as not to injure that of another person, and also the further rule that his use of it <sup>93</sup> shall not be injurious to the community; and hence is not a valid exercise of the legislative power.

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**What is a Lottery** is the subject of the monographic note to *Yellowstone Kit v. State*, 16 Am. St. Rep. 42-48. For a gift enterprise of a merchant held to be a lottery, see *Davenport v. Ottawa*, 54 Kan. 711, 45 Am. St. Rep. 303, 39 Pac. 708.

**Constitutional Law—Gifts and Premiums.**—A statute which declares in effect that no person shall give away anything to a purchaser of goods as an inducement to make the purchase is unconstitutional: *Long v. State*, 74 Md. 565, 28 Am. St. Rep. 268, 22 Atl. 4. So, too, is a statute which prohibits any person selling or disposing of any article of food from giving some other article as a gift, prize, premium, or reward: *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343.

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## ROBINSON v. ROBINSON.

[22 R. I. 121, 46 Atl. 455.]

**A HUSBAND CANNOT TESTIFY AGAINST HIS WIFE FOR THE PURPOSE OF PROVING A CONTRACT BETWEEN THEM** to pay for his services, if the statute of the state declares that a husband is not permitted to disclose any communication made by him to his wife during their marriage, except in trials for divorce.

**EVIDENCE—TESTIMONY OF DIVORCED HUSBAND.**—If a statute provides that husband is not permitted to disclose any communication made to him by his wife during their marriage, except in trials for divorce, the prohibition is not removed or weakened by their subsequent divorce.

Assumpsit by a husband against his divorced wife to recover for services claimed to have been rendered by him for her during their marriage. Judgment was rendered against the defendant, who thereupon petitioned for a new trial.

Franklin P. Owen, for the plaintiff.

David S. Baker, for the defendant.

**121 PER CURIAM.** The petition for a new trial on the ground that the verdict is against the evidence must be granted, because the alleged contract, being between husband and wife, is not supported by any competent testimony. The husband was the only witness to the alleged contract, and under the General Laws of Rhode Island, caption 244, section 37, the husband is not permitted to disclose any communication made to him by his wife during their marriage, except in trials for divorce. No exception was taken on this ground, but, since the statute is founded on reasons of public policy, it cannot be waived by the parties: *Campbell v. Chace*, 12 R. I. 333. Though the parties were not husband and wife at the time of the trial, the same reasons of policy would preclude a disclosure of the communication **122** after dissolution of the marriage as well as before, and such was the evident purpose of the statute.

The case is remitted to the common pleas division, with direction to enter judgment for the defendant for costs.

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**Witnesses.**—The competency of husband and wife as witnesses is discussed in the monographic note to *Commonwealth v. Sapp*, 29 Am. St. Rep. 411-423. After the death of his wife a husband may testify as to a business transaction with her in the presence of a third person: *In re Buckman's Will*, 64 Vt. 313, 33 Am. St. Rep. 930, 24 Atl. 252. But neither death nor divorce renders privileged communications between them admissible: *Note to Commonwealth v. Sapp*, 29 Am. St. Rep. 418.

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## O'REILLY v. KELLY.

[22 R. I. 151, 46 Atl. 681.]

**ESTATES OF DECEDENTS—FUNERAL EXPENSES, WHO MAY INCUR OR CONTROL.**—If a decedent leaves no widow or children and no other relatives inclined to take upon themselves the duty of making the necessary arrangements for his funeral, it becomes the duty of his sister in law, who had been his housekeeper until his death, and has thereby been left in charge of his body, to make such arrangements as are necessary for its decent burial, and she has authority to charge his estate with the expense of articles ordered by her and in fact used at his funeral and suitable to his rank and circumstances and not disproportionate to the condition of his estate.

**ESTATES OF DECEDENTS—FUNERAL EXPENSES, WHAT MAY INCLUDE.**—THE OBTAINING OF FLOWERS for the funeral of a decedent, while not a necessity, is certainly appropriate and in harmony with the usual feelings and sentiments of our common humanity, and gives rise to a valid charge against his estate.

**ESTATES OF DECEDENTS—FUNERAL EXPENSES, WHAT CHARGEABLE AS, AND WHO MAY IMPOSE LIABILITY FOR.**—It is the duty of an executor or administrator to bury the decedent in a manner suitable to the estate he leaves behind him. If this duty, in the absence or neglect of the executor, is performed by another, not officiously but under the necessity of the case, the law implies a promise to reimburse him for the reasonable expenses incurred and paid. What expenses may properly be incurred in such circumstances depends largely upon the custom of people of like rank and condition of society and the condition of the estate left by the decedent.

Hugh J. Carroll, for the plaintiff.

Joseph Osfield, Jr., for the defendant.

**151** **TILLINGHAST, J.** This is assumpsit for flowers furnished for the funeral of James Monaghan, the defendant's intestate, upon the order of Charlotte Campbell, who was a sister in law of the intestate, and who had lived with him as his housekeeper for eighteen years previous to his death. The case shows that the deceased left no widow or children, and that he left real estate valued at about four thousand dollars, and life insurance of the value of two thousand dollars. It does not appear that he left any debts. The value of the flowers furnished for the funeral was fifteen dollars. At the trial of the case in the district court of the **152** tenth judicial district, the plaintiff was nonsuited on the ground that as matter of law the estate could not be held to pay for the flowers which were furnished, as they were not necessary. The plaintiff excepted to the ruling, and has brought the case here on a bill of exceptions to have said ruling reviewed. We think the ruling was erroneous. As the deceased left no widow or children, and, so far as appears, no relatives, who were disposed to take upon themselves the duty of making the necessary arrangements for the funeral, it became the duty of the sister in law, as housekeeper for the deceased, and the only person left in charge of the body, to make such arrangements, and see to it that the deceased was decently interred. What expense may properly be incurred in such circumstances depends largely upon the custom of people of like rank and condition in society, and the condition of the estate left by the deceased: **2** Woerner on American Law of Administration, secs. 357, 358; **7** Am. & Eng. Ency. of Law, 301, note 3. The demands of common propriety and decency should always be observed in connection with the burial of the dead, and the law pledges the credit of the estate for the payment of such expenses as are reasonably incurred



for this purpose after the death and before the appointment of an administrator: *Phillips v. Phillips*, 87 Me. 324, 32 Atl. 963; *Fogg v. Holbrook*, 88 Me. 169, 33 Atl. 792; 3 *Williams on Executors*, \*1679. The custom of having flowers at funerals is now well-nigh universal in this country; and when not abused by extravagance or unseemly ostentation, it is certainly to be commended as giving appropriate expression to our feelings of respect and love for the departed. It is true that, strictly speaking, flowers are not a necessity on such occasions; but, like many other things of which the same might be said, they are certainly appropriate and in harmony with the better feelings and sentiments of our common humanity. And we think it is clear that in the case at bar the housekeeper of the intestate, in the circumstances above mentioned, was warranted in obtaining, upon the credit of the estate, the flowers in question. Mr. Woerner, in his valuable work on the American Law of Administration, volume 2, page 759, says: "It is <sup>153</sup> the duty of the executor or administrator to bury the deceased in a manner suitable to the estate he leaves behind him; and if this duty, in the absence or neglect of the executor, is performed by another—not officiously, but under the necessity of the case—the law implies a promise to reimburse him for the reasonable expenses incurred and paid." So careful is the law to provide for necessary funeral expenses, that liabilities incurred therefor invariably take the first rank as debts against the estate; and in this state they are made a preferred claim even in cases of insolvency: R. I. Gen. Laws, cap. 215, sec. 16, and, also, cap. 274, sec. 27. The estate, real and personal, of every deceased person is also expressly made chargeable with such expenses by the General Laws of Rhode Island, caption 218, section 1: See *Buxton v. Barrett*, 14 R. I. 40.

It is common knowledge that an administrator is almost never appointed until after the burial of the intestate. Somebody other than he, therefore, must necessarily make the arrangements for the funeral, and, in connection therewith, incur, either personally or as informally representing the estate, the necessary indebtedness therefor. And such acts do not make the person performing them an executor de son tort: *Rogers v. Price*, 3 *Younge & J.* 37, note A. If an undertaker is employed, somebody must employ him; and if it is understood that the person employing him is thereby to be rendered personally liable for the services to be rendered, it might sometimes happen that the funeral would be unduly delayed, and the divine in-

junction to "let the dead bury their dead" be literally heeded. In *Samuel v. Thomas*, 51 Wis. 552, 8 N. W. 361, the question to be determined was what expenses incurred intermediate the death of an intestate and the granting of letters of administration were legally chargeable to the estate, and the answer of the court was as follows: "We think that only such necessary expenditures as from the nature of the circumstances cannot properly be postponed until an administrator shall be appointed are so chargeable. This rule will, of course, entitle an heir, a legatee, widow, or guardian, or even a stranger who has paid reasonable <sup>154</sup> burial expenses necessarily incurred before administration could be granted, to be reimbursed from the estate. But, as we understand the law, the rule goes no further. Every expenditure which can decently and reasonably be postponed until an administrator is appointed should be so postponed; and one who, before such appointment, voluntarily incurs an expense for which there is no immediate necessity, does so in his own wrong, and cannot compel the administrator, when appointed, to reimburse him."

In *Tugwell v. Heyman*, 3 Camp. 298, the defendants were sued as executors for the funeral expenses of the testator, who left considerable property. The reasonableness of the plaintiff's bill was not denied, but it appeared that the defendants had given no orders whatever respecting the funeral. The question, therefore, arose whether, under these circumstances, they were liable upon an implied promise to the plaintiff. Lord Ellenborough said: "I think the defendants are liable in this action. It is allowed that the funeral was conducted in a manner suitable to the testator's degree and circumstances, and that the plaintiff's charge is fair and reasonable. The defendants do not deny that they have assets. Then, will not the law imply a promise on their part to satisfy this demand? It was their duty to see that the deceased was decently buried; and the law allows them to defray the reasonable expense of doing so before all other debts and charges. It is not pretended that they ordered anyone else to furnish the funeral, and the dead body could not remain on the surface of the earth. It became necessary that some one should see it consigned to the grave; and I think the executors, having sufficient assets, are liable for the expense thus incurred."

In *Rogers v. Price*, 3 Younge & J. 27, it was held that an executor who has assets sufficient for that purpose is liable, upon an implied promise, to pay for a funeral suitable to the de-

gree of his testator, furnished by the direction of a third person. In delivering his opinion in the case, Garrow, B., used the following forcible illustration in support of his <sup>155</sup> position: "Suppose a person to be killed by accident at a distance from his home; what, in such a case, ought to be done? The common principles of decency and humanity, the common impulses of our nature, would direct everyone, as a preliminary step, to provide a decent funeral at the expense of the estate, and to do that which is immediately necessary upon the subject in order to avoid what, if not provided against, may become an inconvenience to the public. Is it necessary in that or in any other case to wait until it can be ascertained whether the deceased has left a will or appointed an executor; or, even if the executor be known, can it, where the distance is great, be necessary to have communication with that executor before any step is taken in the performance of those last offices which require immediate attention?" He then added: "It is admitted here that the funeral was suitable to the degree of the deceased, and upon this record it must be taken that the defendant is executor with assets sufficient to defray this demand. I therefore think that, if the case had gone to the jury, they would have found for the plaintiff, and that therefore this rule should be made absolute."

In *Luscomb v. Ballard*, 5 Gray, 403, 66 Am. Dec. 374, which was cited by Durfee, C. J., in support of the position taken by this court in *Tucker v. Whaley*, 11 R. I. 543, which will be referred to later on, the court held that for the funeral expenses of the deceased the executor was chargeable in his representative character, and that judgment therefor should be rendered *de bonis testatoris*.

*Sweeney v. Muldoon*, 139 Mass. 304, 52 Am. Rep. 708, 31 N. E. 720, was a case where the plaintiff, at the request of the widow and the remaining relatives of the deceased, purchased a burial lot for the deceased at a cost of one hundred and twenty-five dollars, and also incurred other expenses, as follows: Digging grave, three dollars; use of chapel for service and for funeral ceremony, twelve dollars; curtains, ten dollars; flowers, six dollars; underwear and clothing, three dollars and forty cents; monument, carting and setting, and fixing lot, one hundred and thirteen dollars. These items were all allowed as proper funeral expenses excepting the last named, Field, J., <sup>156</sup> saying that "the law raises a promise on the part of the administrator, so far as he has assets, to pay the reasonable



funeral expenses of burying the deceased, although they are incurred before his appointment."

In *Hapgood v. Houghton*, 10 Pick. 154, Putnam, J., said: "The estate in the hands of the executor is bound by law for the payment of the expenses of the decent interment of the deceased. It is just as liable for the coffin and other necessary charges of the funeral as for necessary supplies in the lifetime. We are all clearly of the opinion that the law raises a promise on the part of the executor or administrator to pay the funeral expenses so far as he has assets."

There are certain expressions in the opinion of this court in the case of *Tucker v. Whaley*, 11 R. I. 543, which taken by themselves, may seem to be at variance with the position we have taken in the case at bar, but we think that case is clearly distinguishable from this on the facts. There the defendant, who bought the hay to feed the cattle of the intestate, though not the administrator at the time, subsequently became such, and hence the court held that he could be regarded as having been the administrator by relation when he made the purchase. The action was not brought against the defendant as administrator, however, but was brought against him in his individual capacity; and it would seem that the court took the view that it should have been brought against him as administrator, as is done in the case now before us, for the court said: "The hay procured of the plaintiff was necessary for the sustenance of the cattle belonging to the estate, and ought to be paid for out of the estate as an expense incident to the administration." And further: "The defendant should have paid the plaintiff's claim and charged it to the estate, and the charge, being proper, would undoubtedly have been allowed by the court of probate."

Exceptions sustained, and case remitted to the district court of the tenth judicial district for a new trial.

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**Funeral Expenses.**—The reasonable and necessary expenses of the burial of a deceased person are a charge upon his estate. The duty of burial is upon the executor, and, in the absence or neglect of the executor, the law implies a promise from him to remunerate one who incurs the expense of such burial: *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384. As to what may be included under funeral expenses, see *Webb's Estate*, 165 Pa. St. 330, 44 Am. St. Rep. 666, 30 Atl. 827; *Shaeffer v. Shaeffer*, 54 Md. 679, 39 Am. Rep. 406; note to *Gregory v. Hooker*, 9 Am. Dec. 652, 653.

## SHELDON v. HAMILTON.

[22 R. I. 230, 47 Atl. 316.]

**LANDLORD AND TENANT—WATER RATES—LIABILITY FOR.**—A lessee of premises, part of the appurtenances of which are pipes and other fixtures for the purpose of receiving water from municipal waterworks, does not owe to his lessee the duty of supplying the premises with water, nor of paying bills therefor during the continuance of the tenancy, though the statute establishing such waterworks provides that the owner, as well as the occupant of premises supplied with water, may be held liable to pay therefor. Especially is this true when the water is measured by a meter and paid for by the cubic foot, and when it must hence be impossible for a landlord to determine in advance the amount for which the premises may become chargeable during the lease.

Tillinghast & Tillinghast, for the plaintiff.

W. B. W. Hallett and H. W. Kimball, for the defendant.

<sup>232</sup> **DOUGLAS, J.** This is a petition for a new trial of an action of debt for rent for a dwelling-house in the city of Providence. The questions involved arise upon the claim of the defendant to set off against the rent, which is not disputed, certain sums which he paid the city of Providence for water used upon the premises while in his possession. There is no substantial disagreement as to the facts. The plaintiff leased the dwelling-house to the defendant June 17, 1892, the rent reserved being one thousand dollars per annum for the term of five years from July 1, 1892. At the time of defendant's entry there were pipes and fixtures in the house adapted to the use of the city water, and a meter for the measurement of the quantity used. The pipes were connected with the city mains and the water was on. The regulations of the water department show that where water is so supplied the water department requires a payment in advance in January, and unless this payment is exhausted, no further charge is made till the beginning of the next year. The first bill which was presented in this case after the defendant entered was paid by the plaintiff in January, 1893, expecting, as he says, that the defendant would repay him. Accordingly, he presented it to the defendant with his bill for the first quarter's rent for 1893, and thereupon the difference of opinion between them as to their rights and obligations was disclosed. After that each party insisted that the other should pay the water bills, and, the plaintiff

refusing to pay, the defendant, in order to prevent the city from shutting off the water, paid them, and now claims that he should be reimbursed therefor by the plaintiff. The bills were made out by the water department against the plaintiff.

At the trial of the case in the common pleas division the defendant made several requests for rulings which in substance raised the question whether, in the absence of any stipulation in the lease, a landlord is bound to furnish his tenant with water from the city pipes when the house is fitted with pipes and fixtures obviously designed to receive and distribute it. The court refused these requests, and on motion of the plaintiff directed a verdict for the plaintiff for the full <sup>233</sup> amount of the rent unpaid. To these refusals and direction the defendant duly excepted.

We think the action of the common pleas division was correct. It is not the duty of a landlord to furnish water for the use of his tenant unless he has agreed to do so. The pipes and fixtures are appurtenances of the house, as gas-pipes and fixtures in place at the time of the letting are, and the use of them passes necessarily with the tenement. But the water, like gas, is a commodity in no way attached to the realty, not the property of the landlord, but to be furnished for a price by a third party. It is not the duty of the landlord to keep the pipes in repair even (*McKeon v. Cutler*, 156 Mass. 296, 31 N. E. 389), much less to keep them filled with water. An agreement on the part of the landlord to pay water or gas bills may be implied, no doubt, from circumstances, but the fact alone that the house is provided with pipes and fixtures is not sufficient; *McCarthy v. Humphrey*, 105 Iowa, 535, 75 N. W. 314. Nor do we think that the fact that the owner paid the first year's bill would justify an inference that he had agreed to do so or ought to estop him from insisting upon his right.

The statute establishing the city's waterworks provides that the owner as well as the occupant of premises supplied with city water may be held liable to pay for it: R. I. Pub. Laws, March 8, 1866, cap. 640, sec. 6. He paid, as he says, not as acknowledging his ultimate obligation as between himself and the tenant, but expecting to collect the bill with his rent. The tenant was not injured by this payment, and can claim no estoppel by reason of it.

Such an implication might arise from a general custom which the law would attach to the contract; but no such custom is proven in this case, and to be binding it would need to be uni-



versal and reasonable. Water is supplied to dwelling-houses in the city of Providence upon two plans of payment. In one, as in the case at bar, the water is measured by a meter and is paid for by the cubic foot; in the other it is supplied without measurement, and a fixed sum is charged for each faucet, bathtub, etc. (Regulations of the water department in evidence.) In the latter case the landlord <sup>234</sup> knows in advance the amount which will be charged for water, and can include that sum when fixing his rent. In such case the inference that he has done so and so assumed the payment of the bills would be much easier than when he puts it in the power of the tenant to draw an unlimited amount for which someone must pay an unknown price. It would be unreasonable to subject the landlord to such an indefinite burden, which his tenant could increase at will, without the clearest proof that he had voluntarily assumed it.

No case is cited by the defendant to support his theory of the law. He urges that the law throws upon the landlord the obligation to pay all state, city, and county taxes and assessments which become chargeable during the term, and that if the tenant is compelled to pay such charges in order to have the use of the premises, he may recover or retain such sums from the landlord. Doubtless, this is true, but the distinction is well drawn in *Babcock v. Hunt*, L. R. 22 Q. B. 145, between such public charges as are imposed upon one who has no choice in the matter and prices fixed for the use of water which the tenant may take or decline at his option. Water, as supplied here, is a commodity which the tenant requires, but which he can purchase of others if he chooses to submit to that inconvenience. The price charged for it is not a tax any more than the price charged for gas, electricity, steam, or coal, some of which are as necessary commodities as water. Nor does the fact that the city supplies water and a private corporation supplies gas make one a tax rather than the other. The city has no lien on the premises for the payment of water bills, and so the charge is not an encumbrance which the tenant is presumed to pay on account of the landlord.

The case of *Leighton v. Ricker*, 173 Mass. 564, 54 N. E. 251, cited by the plaintiff, is exactly in point and coincides with the views we have stated.

A new trial must be denied, and the case remanded to the common pleas division, with direction to enter judgment upon the verdict.

**Landlord and Tenant—Water—Pipes.**—As between lessor and lessee, it is the duty of the latter to repair a water-pipe not defective in its original construction, and for failure in this he is liable, and not the landlord: *Shindelbeck v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584.

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### DOWELL v. GOODWIN.

[22 R. I. 287, 47 Atl. 693.]

**OFFICER'S RETURN—CONTRADICTION OF IN A SUIT FOR RELIEF FROM A JUDGMENT.**—A bill in equity lies to enjoin an action at law on a judgment which was obtained by the fraud of the officer charged with the service of the writ in the original action, and, for the purpose of supporting the bill, evidence may be received to impeach the officer's return on such writ.

**JUDGMENT—REMEDY AT LAW AGAINST—WHEN INADEQUATE.**—If a judgment has been procured against a defendant by the false return of service of process against him, he cannot be denied the right to enjoin such judgment on the ground that he should first pay it and then resort to an action against the officer who made such return. This would involve circuitry and remoteness in obtaining redress, and an uncertainty as to the result quite foreign to the spirit of equity.

Bill in equity to restrain the prosecution of an action upon a judgment. The case was submitted on the defendant's demurrer to the complainant's bill.

T. W. Robinson and C. J. Farnsworth, for the complainant.

McGuinness & Doran, for the respondent.

**288 TILLINGHAST, J.** This is a bill to enjoin the prosecution of an action at law against the complainant, and for other relief.

The bill sets out that on the 10th of March, 1896, the respondent sued out a writ before the district court of the sixth judicial district, to recover from the complainant the sum of eighty dollars for work and labor done; that said writ was placed in the hands of one John F. Ryan, a constable of Pawtucket, Rhode Island, for service; that it was returnable on the twenty-third day of March, 1896, at which time it was entered in said court; that said constable made a return on the writ, in which he set forth that on the fourteenth day of March, 1896, he attached the right, title, and interest of the defendant in that suit to certain land described in his return,

and that on the same day he summoned the defendant in that suit by leaving an attested copy of the writ with him; that thereafterward on the thirtieth day of March, 1896, said court rendered judgment against this complainant, the defendant in that suit, for said amount claimed, with costs, which judgment has never been appealed from or reversed, and that the same now stands on the record of said court.

The complainant then avers that said Ryan, constable, never made any attachment of the real estate of this complainant on said fourteenth day of March, 1896, nor on any other day; and that he did not leave any copy of said writ with him, the complainant; and that he did not summon him as set forth in his return, or in any other manner whatsoever, either on the said fourteenth day of March, or at any other time; and that the <sup>289</sup> return of said officer was wholly and absolutely untrue and fraudulent in every particular.

The complainant further avers that he did not answer said action at law, because he was wholly ignorant of the existence of the same; and that he did not know thereof, or of any judgment rendered therein, until on or about the thirteenth day of May, 1899.

He further alleges that he was not indebted to the plaintiff in said action in any sum whatsoever, and that the alleged claim set up therein is groundless, and that the judgment rendered therein is fraudulent and void.

The bill further alleges that on the nineteenth day of May, 1899, the respondent commenced an action of debt on judgment against the complainant in said district court, said judgment being the same that was obtained in the fraudulent action above referred to; that in said last-named action he has attached the land of the complainant, and that said action is now pending in said district court.

The bill further alleges that by the fraudulent acts of said Ryan, and his false return on said writ, the complainant has been greatly injured and damaged, and that the respondent is aware of said illegal and fraudulent acts, but persists in pursuing the complainant on said fraudulent judgment; and also that the complainant is wholly remediless at law, and can only have relief in a court of equity. Wherefore he prays that the respondent be perpetually enjoined from further prosecuting his action on said judgment, and for other relief.

To this bill the respondent demurs on the following grounds, namely: 1. That the bill seeks relief against the enforcement



of a judgment obtained upon the writ mentioned in paragraph 2 of the bill, because, as the bill alleges, said writ was not served at all, either by summons or by attachment, while the bill itself and the copy of said writ attached thereto show a return by a proper officer of full and regular service of said writ upon the complainant, both by attaching his real estate and by personal service of a copy of the writ upon him; 2. <sup>290</sup> That the alleged grounds for relief consist wholly and only of the contradiction of the return of the constable upon a writ which he was competent to serve; 3. That the complainant has an adequate remedy at law against the officer and the surety on his bond; and 4. That the bill does not state a case entitling the complainant to the relief prayed for.

The question raised by the first two grounds of demurrer is whether, under the facts set forth in the bill, the officer's return on the writ in the action in which the judgment sued on was recovered can be contradicted. Or, to state it more generally, the question raised is whether a bill in equity will lie to enjoin an action at law on a judgment which was obtained by the fraud of the officer charged with the service of the writ in the original action.

The respondent's counsel contend that the officer's return cannot thus be contradicted, and that such a bill will not lie; and that the cases of *Angell v. Bowler*, 3 R. I. 77, *Estes v. Cooke*, 12 R. I. 6, and *Barrows v. National Rubber Co.*, 13 R. I. 48, fully sustain them in the position which they take. The cases cited hold that an officer's return is conclusive and cannot be contradicted incidentally by motion or plea. Also, that the return is part of the record, and that parol evidence cannot be submitted to contradict the court record; for so long as it remains it is conclusive upon the parties, and in order to change it some appropriate proceeding acting directly upon the record must be instituted. It is to be observed, however, that the rule as thus laid down in the cases relied on applies to common-law actions (see *Pratt v. Jones*, 22 Vt. 345, 54 Am. Dec. 80; *Pettes v. Bank of Whitehall*, 17 Vt. 444); and hence the question arises whether it is also applicable to suits in equity; for if so, it is controlling in the case at bar unless it can be held that this is a proceeding acting directly upon the record in said original action, which we do not think it is. To state the question more concisely, can a court of equity ever interfere and grant relief by way of permitting the record of a common-law court to be impeached as to the officer's return on the writ,

or as to any other part of the record? We think this question must be answered in the affirmative. <sup>291</sup> One of the peculiar provinces of a court of equity is to relieve against willful misrepresentation and fraud. A court of equity is a court of conscience; and whatever, therefore, is unconscionable is odious in its sight. Indeed, it is said by Judge Story in his Commentaries that "fraud is even more odious than force." That a judgment obtained in a court of law by a false and fraudulent writ or by a false and fraudulent return thereon by the officer is so wholly unconscionable as to shock the inherent sense of justice of all right-thinking men, no one will deny. And it would be a reproach to our system of jurisprudence if a court of equity could afford no relief against a judgment so obtained. But that equity does afford a full and adequate remedy against such a wrong, and that the case stated in the bill before us is clearly within the jurisdiction of such a court, is fully shown by the authorities, to some of which we will proceed to refer.

Perhaps the leading case in this country upon the subject of equitable relief against judgments at law is that of *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, in which Chief Justice Marshall specified the grounds for the interference of equity in the following terse language: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself at law, but was prevented by fraud or accident unmixed with any fraud or negligence in himself or his agents, will justify an application to a court of chancery."

In *Bridgeport Sav. Bank v. Eldredge*, 28 Conn. 563, 73 Am. Dec. 688, Storrs, C. J., said: "No principle is better settled, or more frequently acted on, than that a court of equity will interfere to restrain the use of an advantage gained by the proceedings of a judicial tribunal, either of law or equity, irrespective of the inquiry whether those proceedings were regular or not, when they must otherwise make either of those tribunals an instrument of injustice, in all cases where such advantage has been <sup>292</sup> gained by the fraud of the opposite party, or by accident or mistake, without the fault of the party seeking relief against them. In regard to the judgment of a court of law, it does not in such a case reverse that judgment, but, conceding it

to be valid, it prevents its being used for an unconscientious or inequitable purpose."

In *Earle v. McVeigh*, 91 U. S. 507, Mr. Justice Clifford said: "Argument to show that no person can be bound by a judgment, or any proceeding conducive thereto, to which he was never a party or privy, is quite unnecessary, as no person can be considered in default with respect to that which it never was incumbent upon him to fulfill. Standard authorities lay down the rule that, in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject matter; and it is equally clear that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it, as the want of jurisdiction makes it utterly void and unavailable for any purpose."

In *Hogg v. Link*, 90 Ind. 346, it is held to be well settled that a judgment may be enjoined for fraud in obtaining it, at the suit of the injured party, such a fraud being regarded as perpetrated upon the court as well as upon the injured party.

In *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152, it was held that a court of chancery has power to grant relief against judgments obtained by fraud. "Any fact," says the court, "which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not avail himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an interference by a court of equity."

Perhaps no better summary of the law appertaining to the question now under discussion can be given than that which is found in *Freeman on Judgments*, volume 2, section 495. That part of the section which is pertinent reads as follows: 293 "We shall now consider the circumstances in which a defendant may be relieved from a judgment or decree rendered in an action wherein his failure to defend is not chargeable to the plaintiff. Prominent among the grounds of relief belonging within this class of cases is the one where the court has proceeded to condemn a party without first giving him an opportunity to be heard. A judgment pronounced without service of process, actual or constructive, and without the defendant's knowing that a court has been asked to adjudicate upon his rights, is regarded with such disfavor at law that a variety of motions, writs, and proceedings are there provided to overthrow it; and in many courts it is at all times and upon all occasions



liable to be entirely disregarded upon having its jurisdictional infirmity exposed. But proceedings in equity are peculiarly appropriate for the exposure of this infirmity. They permit of the formation of issues upon the question of service of process, and of the trial of those issues after full opportunity has been given to those who seek to sustain as well as those who seek to avoid the judgment. If at such trial it satisfactorily appears that the defendant was not summoned, and had no notice of the suit, a sufficient excuse is shown for his neglect to defend, and equity will not allow the judgment, if unjust, to be used against him, no matter what jurisdictional recitals it contains."

To the same general effect are the following cases, viz.: *Wistar v. McManes*, 54 Pa. St. 326, 93 Am. Dec. 700; *Stubbs v. Leavitt*, 30 Ala. 352; *Duncan v. Gerdine*, 59 Miss. 550; *Jeffery v. Fitch*, 46 Conn. 601; *Insurance Co. v. Waterhouse*, 78 Iowa, 674, 43 N. W. 611; *Vilas v. Jones*, 1 N. Y. 274; *Wingate v. Haywood*, 40 N. H. 437; *Little v. Price*, 1 Md. Ch. 182; *Lester v. Hoskins*, 26 Ark. 63; *Martin v. Parsons*, 49 Cal. 94; *French v. Shotwell*, 5 Johns. Ch. 555. See, also, *Beach on Injunctions*, secs. 615-631; 1 *Spelling on Extraordinary Relief*, sec. 139. Although there is no decision in our own reports which fully controls the case at bar, yet there are several in which the validity of the doctrine above enunciated is clearly recognized. In *Spooner v. Leland*, 5 R. I. 348, which was a bill to enjoin an execution <sup>294</sup> in an action at law, this court, while it denied the relief prayed for on the ground that the answer completely negatived all the allegations of the bill as to the defenses of the complainant in the original action, yet held that if the party wronged had no notice or knowledge of the judgment obtained against him until after the expiration of the year within which he might have applied for relief on the law side of the court, he would certainly, on the ground of breach of trust and for the prevention of fraud, be entitled to it in equity.

In *Furbush v. Collingwood*, 13 R. I. 720, which was a bill by a judgment creditor for injunction and for revision of the judgment in the matter of costs, it was held that a court of equity has no more jurisdiction to revise and correct the judgments of a court of law in the matter of costs than in the matter of debt or damages, and that in either matter it has jurisdiction only in case of fraud, accident, or mistake, or something of that nature. In delivering the opinion of the court, *Durfee, C. J.*, said: "We apprehend that what is meant by

fraud, as a ground for enjoining or setting aside a judgment, is not mere falsity of claim or proof, but fraud outside of them, perpetrated by some artifice or contrivance of the party or person benefited, or by some collusion of both parties, whereby, in the course of the trial, or in entering judgment, the injured party or the court has been imposed upon or betrayed into inattention and deceived: Freeman on Judgments, secs. 487, 489; High on Injunctions, secs. 86, 96, 97, and notes; Muscatine v. Mississippi etc. R. R. Co., 1 Dill. C. C. 536, Fed. Cas. No. 9971; Bateman v. Willoe, 1 Schoales & L. 201, 204; Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604. No such fraud is alleged here": See, also, Linnell v. Battey, 17 R. I. 241, 21 Atl. 606; Rogers v. Rogers, 17 R. I. 623, 24 Atl. 46.

The allegations of the bill in the case at bar satisfy all of the conditions which these cases, in common with the great current of authorities, render essential in order to give jurisdiction to a court of equity, and hence we have no doubt that it is maintainable.

The third ground of demurrer is not well taken. The complainant <sup>295</sup> has no adequate remedy at law. To permit the respondent to prevail in his action on the judgment sued on and compel the complainant to pay the same, and then resort to an action against the officer who served the writ, involves a circuituity and remoteness in attaining redress, and an uncertainty as to the result of such an action, which is quite foreign to the spirit of equity: 1 Black on Judgments, sec. 377; Ridgway v. Bank of Tennessee, 30 Tenn. 523.

As the fourth ground of demurrer is covered by what we have already said, there is no occasion for us to consider it separately.

The demurrer is overruled.

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**Judgment.**—On relief in equity from judgments obtained by false return of service of process, see the monographic note to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 245, 260.

## BATTALION WESTERLY RIFLES v. SWAN.

[22 R. I. 333, 47 Atl. 1090.]

A MANDATORY INJUNCTION MAY ISSUE TO COMPEL THE RETURN OF CERTAIN BOOKS which have been loaned to the defendant temporarily, where they have no ascertainable value in money but great value to the complainant as an account of its history, and hence an action of damages must be quite an inadequate remedy.

Suit for a mandatory injunction. Assumpsit on a demurrer to the complainant's bill.

Walter H. Barney, for the complainant.

Howard A. Lamprey, for the respondent.

**333 PER CURIAM.** The bill is filed to compel the respondent to return to the complainant certain books of the company which were loaned to the respondent, then a member of the company, for temporary examination. The bill is demurred to upon the grounds, as presented at the hearing, that the complainant has an adequate remedy at law and the triviality of the subject matter of the suit.

Such books have no ascertainable value in money, and hence an action for damages would be quite inadequate. But record books may have a great value to the complainant company as an account of its history, and the only remedy at law would be an action of replevin. The bill alleges that this has been tried without effect. The complainant's remedy to proceed in equity is therefore clear. The case is similar in principle to *Manton v. Ray*, 19 R. I. 423, 36 Atl. 1125.

**334** The character of the books, as set forth in the bill, shows that they are not to be measured by a trivial money value, but are both important and valuable on other grounds.

Demurrer overruled.

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A Mandatory Injunction may Issue to compel a defendant to restore certain books which he is alleged to have removed in violation of an agreement with the plaintiff: See the monographic note to *Murdock's Case*, 20 Am. Dec. 401, on mandatory injunctions.



## TOLMAN v. AMERICAN NATIONAL BANK.

[22 R. I. 462, 48 Atl. 480.]

**BANKING—FORGED CHECK—LIABILITY FOR.**—Where A personates B, and thereby obtains a loan of C, who draws his check for the amount thereof in favor of B, and delivers it to A, who obtains payment thereof by a forged indorsement of the name of B, and the amount is charged against C's deposit account at the bank, he may, on discovering the facts, maintain an action against the bank for the amount thus paid and charged against his account. It is not material that the man who negotiated the loan received the check, and that it was intended to be paid him, for this intention was based on the false assumption that he was the person named in the check. The statute of Rhode Island declaring that "where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative; and no right to retain the instrument or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up forgery or want of authority," is in harmony with the rule above stated, but it is but an expression of the pre-existing common-law rule upon the subject.

Assumpsit. A verdict for the defendant having been directed, the plaintiff petitioned for a new trial.

Irving Champlin, for the plaintiff.

Tillinghast & Murdock, for the defendant.

**462 STINESS, C. J.** The plaintiff sues to recover money paid out by the defendant, on his account, upon his check, under a forged indorsement. Louis Potter, representing himself to be Ernest A. Haskell, went to the plaintiff to get a loan of money, giving the residence and occupation of Haskell as his own. The plaintiff made inquiry, and finding that Haskell was employed and was living as represented, he agreed to make the loan. Potter, under the name of Haskell, gave his note to the <sup>463</sup> plaintiff, and the plaintiff gave him a check on the defendant payable to the order of Haskell, delivering it to Potter, supposing him to be Haskell. Potter indorsed Haskell's name on the back of the check and gave it to A. R. Himes, who collected it from the bank. When the note given to the plaintiff became due, the fraud was discovered; he thereupon notified the bank and demanded a return of the amount paid on the check to the credit of his account.

At the trial a verdict for the defendant was directed, and the plaintiff petitions for a new trial. The question is whether the bank is liable for the payment which it made on this check.

It is a fundamental rule of banking that, when a bank receives money to be checked out by a depositor, it is to be paid only as the depositor shall order. The bank assumes this duty in receiving the deposit. If, therefore, it pays out money otherwise than according to such order, it is liable to the depositor for the amount so paid. The bank thus assumes the responsibility of seeing that the money gets to the party authorized to receive it. Hence, if it pays money out on a forged signature, the depositor being free from blame or negligence, it must bear the loss. In this case the plaintiff directed the money to be paid to the order of Ernest A. Haskell. It was not so paid. He did not indorse the check. Potter forged his signature. Under these circumstances the plaintiff's right to recover seems to be plain. But the defendant contends that the man who made the contract received the check; that it was intended for him; that the money went to him, and so there was no forgery and the bank is not liable.

It would seem that upon so plain a proposition the decisions should be unanimous; but it is not so. To say that the money was intended for the one who had committed the fraud is simply to say that the fraud was complete. It is a surprising doctrine that, if A can successfully personate B, he thereby escapes being guilty of forgery in signing B's name on a check of C's. Of course, C intended the money <sup>464</sup> to go to him as an actual person, but only because he supposed that he was the person whom he represented himself to be. Can the imposition upon C justify A's personation and signature of B? If C had sent his check to B by A, and the latter had written B's indorsement thereon, no one would say that it was not forgery. How does it change the case when A gets the check by making C believe that he is B? In one case C sent it to B, and in the other he supposed that he handed it to B directly. In both cases it was intended for B.

The plaintiff's counsel has well said, in this case, that any decision to the effect that a bank is protected in paying a check to an imposter who has forged the payee's name on the check, upon the ground that it carries out the actual intent of the drawer, is based upon a manifest fallacy.

Moreover, of what consequence is the intent of the drawer of the check, when the direction is to pay to the party named?

He has the right to assume that the bank will pay to the party as directed. In this case the money was intended for Haskell, because his was the only name suggested; he had been looked up and found to be responsible. It is a perversion of words to say that it was intended for Potter, simply because he had fraudulently impersonated Haskell and led the plaintiff to believe that he was Haskell. The plaintiff did not intend to let Potter have money; his check showed he was not to have it, because it was made payable to Haskell. When, therefore, Potter fraudulently indorsed Haskell's name on the check, it was a typical case of forgery. It was a false signature, with intent to deceive.

The defendant relies on *Robertson v. Coleman*, 141 Mass. 231, 55 Am. Rep. 471, 4 N. E. 619, where the suit was by a holder against the maker of a check. The payee had assumed the name of another and obtained the check as the price for stolen property sold by the defendants as auctioneers. The decision was for the plaintiff, and good ground is given for it in the opinion, in this, that the plaintiff was a bona fide holder without notice, and that the defendants simply supposed the payee to be Charles Barney, of Swanzey, but not from any false representation <sup>465</sup> made to them. Had the opinion stopped there, no case of fraud would have appeared. But the court put these facts aside as immaterial, and then said: "This was the person intended by the defendants as the payee of the check, designated by the name he was called in the transaction, and his indorsement of it was the indorsement of the payee of the check by that name. The contract of the defendants was to pay the amount of the check to this person or his order, and he has ordered it paid to the plaintiff." No authorities are cited in the opinion, but the case has been cited as an authority since: See *Emporia Bank v. Shotwell*, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141; *United States v. National Exch. Bank*, 45 Fed. 163; *Land Title etc. Co. v. Northwestern Nat. Bank*, 196 Pa. St. 230, 79 Am. St. Rep. 717, 46 Atl. 420; *First Nat. Bank v. American Exch. Nat. Bank*, 49 N. Y. App. Div. 349, 63 N. Y. Supp. 58.

These cases lose sight of the distinction between real and fictitious persons. In the latter case there is nobody to inquire about; no one, in fact, misrepresented; no one in the mind of one party other than the person with whom he is dealing. In the case of a real person, however, one party, having him in mind, satisfies himself about the responsibility of such party



and supposes that he is dealing, not with the person who is in fact before him, but with the one whom he has in mind and whom the one before him falsely personates. Thus, in *Mead v. Young*, 4 Term Rep. 28, it was held that where a bill of exchange got into the hands of one of the same name as the payee, yet such person, knowing that he was not the person in whose favor it was drawn, was guilty of forgery in indorsing it.

In *Roberts v. Tucker*, 16 Q. B. 560, 15 Jur. 987, it was held that a banker could not debit his customer with the payment made to one who claimed through a forged indorsement made by the solicitor of the payee. That was not a case of misrepresentation of persons, but it is referred to in *Vagliano v. Bank of England*, 23 Q. B. 243, as having settled the relations between bankers and customers for many years. This latter case came under the bills of exchange act, and it was held that as the bill was not made to a fictitious or nonexisting person, it could not be treated as a bill payable to bearer, and so defendants could not be protected in a payment under a <sup>466</sup> false indorsement. Although this last decision was overruled in *Bank of England v. Vagliano* (1891), L. R. App. Cas. 167, on a close division, *Roberts v. Tucker*, 16 Q. B. 560, which was a case of forgery, as this one is, was not overruled.

In *Armstrong v. National Bank*, 46 Ohio St. 512, 15 Am. St. Rep. 655, 22 N. E. 866, it is held that even where the payee is nonexisting, the rule making such paper payable to bearer does not apply where the maker, supposing the payee to be a real person and intending payment to be made to such person, is induced by fraud so to draw it. In *Graves v. American Exch. Bank*, 17 N. Y. 205, it was held to be forgery for one, not the payee of a bill, but bearing the same name, to indorse and transfer it, knowing that he was not intended as the payee.

The true rule is well stated in the headnotes of *Rogers v. Ware*, 2 Neb. 29, as follows: "If the bill run to a fictitious payee it is as if drawn payable to bearer, and indorsement is not necessary. But if it be payable to some person known at the time to exist, and present to the mind of the drawer when he made it, as the party to whose order it was to be paid, the genuine indorsement of such payee is necessary. Nor is the case changed by the circumstance that the party who induced the drawer to make such bill defrauded him in so doing."

*Rowe v. Putnam*, 131 Mass. 281, is to the same effect, but is not referred to in *Robertson v. Coleman*, 141 Mass. 231, 55 Am. St. Rep. 471, 4 N. E. 619.

The attention of counsel was called to the negotiable instruments act, Public Laws, January, 1899, caption 674, section 31, which is: "Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative; and no right to retain the instrument or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature unless the party against whom it is sought to enforce such right is precluded from setting up forgery or want of authority."

This statute covers this case. We have referred to authorities because the defendant's counsel so earnestly and ably argued that the act did not alter the law-merchant that it <sup>467</sup> seemed proper to show that the law in this respect, outside of the act, is in a very unsatisfactory state, and that the act is right. We do not think that the act does alter the law as it was when, a few years ago, it seems to have been switched off on a fallacy in some places. One of the advantages of the act is in settling the question. Waiving the question of forgery, about which the cases we have cited differ, the signature in this case is clearly one "made without the authority of the person whose signature it purports to be," and, therefore, it is "wholly inoperative." This being so, the defendant cannot justify its action under it, there being no evidence of any conduct by the plaintiff to mislead the defendant and so to estop his present claim. As the case stood, the plaintiff had ordered money paid to Haskell. The bank had not so paid it. The fact that the plaintiff had been imposed upon did not relieve the bank from its duty to see that the money was paid according to order. The case should have gone to the jury.

New trial granted.

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**On the Liability for Paying Forged Checks**, see the monographic note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889-899. Consult, also, the recent cases of *Land etc. Co. v. Northwestern Nat. Bank*, 196 Pa. St. 230, 79 Am. St. Rep. 717, 46 Atl. 420; *Harter v. Mechanics' Nat. Bank*, 63 N. J. L. 578, 76 Am. St. Rep. 224, 44 Atl. 715; *Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 182 Ill. 367, 74 Am. St. Rep. 180, 55 N. E. 360.

## WHIPPLE v. GUILÉ.

[22 R. I. 576, 48 Atl. 935.]

**EQUITY PRACTICE.**—A MOTION TO DISMISS A BILL FOR MISJOINDER OF PARTIES PLAINTIFF MAY BE MADE AFTER an answer has been filed.

**NUISANCE**—JOINDER OF PARTIES IN SUITS TO ABATE. WHERE THE OWNERS OF SEPARATE PARCELS OF REAL PROPERTY situate in the same neighborhood are all injured in the same manner by an alleged nuisance, they may join in a suit to restrain its continuance.

Suit for a mandatory injunction to restrain the continuance of a nuisance. Assumpsit on motion to dismiss the bill.

Cooke & Angell, for the complainants.

Edwards & Angell, for the respondents.

<sup>576</sup> STINESS, C. J. The complainants, who are owners and tenants of separate estates in the vicinity of the respondents' mill, filed this bill to restrain the respondents from running their mill during the night-time, upon the ground that, so run, it is a nuisance. An answer was filed, and both parties have submitted for allowance issues of fact to be tried by a jury. The respondents now move to dismiss the bill for misjoinder of parties.

The questions raised are whether there is a misjoinder of parties, and if so, whether the motion to dismiss can be made after answer filed. They can be considered together.

The respondents, in support of their motion, claim that there is a misjoinder because each owner and his tenants in a <sup>577</sup> single house could have filed a bill and made as complete a case as in a bill by all the owners together; that the question of nuisance as to one house is independent of the issue of a nuisance as to another house, and hence that the present bill is a consolidation of a number of distinct cases.

If this were so, there could be no doubt that the bill should be dismissed, whether the motion came after answer or not, because a court cannot try several cases in one, nor give separate and unrelated judgments to different parties in a single suit. If interests are such as to present diverse issues or to hinder the court in entering an adequate decree, of course the suit should be dismissed at any stage; for it would be idle to compel parties to go on to an end which the court could not embody



in a judgment. But we do not think that the complainants in this case are in such a plight. They allege a common injury and seek a common remedy which is not divisible, and which, if obtained by one, inures equally to the benefit of all. The cases relied on by the respondents hold that even in a case like this there cannot be a joinder of parties; but an examination of those cases shows how a rule of law may grow from a precedent which does not warrant the subsequent evolution.

In *Jones v. Del Rio* (1823), 1 Turn. & R. 297, a bill was filed by three persons, who were subscribers to a loan to the Peruvian government, against the envoy of the government, for a return of the amounts paid by them, alleging fraud. The court held that each party had a several and distinct demand, and hence they could not file one bill. The parties had not a common cause, and, as to amounts at least, could not have a common decree. There might have been fraud with respect to one subscriber and not to the others, which would have involved separate defenses.

In *Hudson v. Maddison* (1841), 12 Sim. 416, the court held, upon the authority of *Jones v. Del Rio* (1823), 1 Turn. & R. 297, that five owners of separate tenements could not unite in a bill to restrain the erection of a steam-engine and chimney as a nuisance, because the decree would have to provide for five different cases. But obviously this was not so. They sustained a common <sup>578</sup> injury and sought a common remedy. One injunction would answer all their purposes as well as five. There was no occasion for five decrees, since nothing was asked for by them but an injunction. They did not seek to enforce separate demands, as in *Jones v. Del Rio* (1823), 1 Turn. & R. 297, to which an injunction was simply incidental. There was no similarity in the two cases.

The defendants cite some cases in this country which have followed *Hudson v. Maddison* (1841), 12 Sim. 416, viz.: *Mason v. Presbyterian Hospital*, 30 Pitts. Leg. Jour., N. S., 359; *Hinchman v. Paterson etc. R. R. Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; *Fogg v. Nevada Ry. Co.*, 20 Nev. 429, 23 Pac. 840. These rest upon *Hinchman v. Paterson etc. R. R. Co.*, which cites *Jones v. Del Rio* (1823), 1 Turn. & R. 297, as deciding the same point as *Hudson v. Maddison* (1841), 12 Sim. 416. We think they are clearly wrong.

The defendants call our attention to a question put by Jessel, M. R., in *Appleton v. Paper Co.*, 45 L. J. Ch., N. S., 276, in illustration of "the real essence of the difficulty with a bill like

that in the case at bar." The question was, "If twenty people were hurt in a railway collision would that be a common injury, and could they all join as plaintiffs in one action for compensation?" Of course they could not, because the extent of injury would be different in each case and require a separate assessment and judgment. But if they were creditors of the railroad company they could join in a bill for a receiver. The controlling question is not that of diversity in interest, but of unity in remedy.

It is one of the offices of equity to prevent a multiplicity of suits. Why, then, should it compel several suitors, seeking the same and a single remedy, to file separate bills? It is familiar and unquestioned practice for creditors and stockholders to unite in bills for a common remedy, although their debts and stock may vary in amount. This practice has been recognized in this state: See *Hazard v. Durant*, 9 R. I. 602; *Vernon v. Reynolds*, 20 R. I. 552, 40 Atl. 419; *Ball v. Ball*, 20 R. I. 520, 40 Atl. 234.

It is also sustained by numerous cases in other states. Among them is *Rowbotham v. Jones*, 47 N. J. Eq. 337, 20 Atl. 731. That case holds that several owners of distinct tenements may join in a suit to restrain a nuisance which is common to all of them and affects them in a similar way. It makes no reference <sup>579</sup> to the previous case of *Hinchman v. Paterson etc. R. R. Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252, but in view of the decision we assume that the last-named case is no longer regarded as law in New Jersey: See, also, to the same effect, *Ballou v. Hopkinton*, 4 Gray, 324; *Sullivan v. Phillips*, 110 Ind. 320, 11 N. E. 300; *Pettibone v. Hamilton*, 40 Wis. 402; *Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241; *Gillespie v. Forrest*, 18 Hun, 110; *Peck v. Elder*, 3 Sand. 126; *Foot v. Bronson*, 4 Lans. 47; *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *Robinson v. Baugh*, 31 Mich. 290; *Hendrickson v. Wallace*, 31 N. J. Eq. 604.

The motion to dismiss the bill is overruled.

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**Nuisance.**—Joinder of several persons in a bill to restrain a nuisance is permissible when it is a common injury to their several tenements: *Murray v. Hay*, 1 Barb. Ch. 59, 43 Am. Dec. 773; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243, 38 N. W. 890.

## CANNING v. OWEN.

[22 R. I. 624, 48 Atl. 1033.]

**FIXTURES—GENERAL RULE TO DETERMINE WHAT ARE.**—Whatever is once annexed to the freehold by its owner, to be used and enjoyed in connection therewith, becomes part of the realty, and passes by a conveyance thereof.

**FIXTURES—MODE OF AFFIXING IS NOT CONCLUSIVE.** It is not necessary to impose upon a chattel the character of a fixture that it be so affixed to the realty that it cannot be removed without physical injury thereto, if it has been attached with a view of enhancing the value of the realty and for the purpose of being permanently used in connection therewith. The intention of the owner need not be expressed in words, but must ordinarily be inferred from the nature of the articles affixed, the relation and situation of the parties interested, the policy of the law with respect thereto, the mode of annexation and the purpose for which it was made. The question whether chattels are to be regarded as fixtures depends less upon the measure of their annexation than upon their own nature, and their adaptation to the purpose for which they are used.

**ELECTRIC LIGHT FIXTURES** which take the place and serve the purpose of ordinary gas fixtures, though they may be removed without physical injury to the freehold, must, as between mortgagor and mortgagee, be regarded as part of the realty which the former has no right to detach and remove after a sale has been made under the mortgage.

**TROVER—CONVERSION.**—If the party making a demand for the possession of chattels is himself then in possession, and can remove it if he sees fit, the refusal of his demand does not constitute conversion sufficient to sustain an action of trover.

Trover to recover for the conversion of certain property included in which were electric light fixtures. Judgment for the plaintiff and thereafter plaintiffs petitioned for a new trial.

Dennis J. Holland, for the plaintiff.

C. M. Lee and Tillinghast & Murdock, for the defendant.

**624 TILLINGHAST, J.** One of the grounds of the defendants' petition for a new trial is that the trial court allowed testimony to be introduced by the plaintiff as to the conversion by defendants of certain electric light fixtures which had been attached to the Lake View Hotel property by plaintiff, while she owned the same, and which fixtures, at the time they were so attached, were intended by the plaintiff to be and remain a part of the real estate. She did not detach or attempt to detach said fixtures until some time after the hotel property was sold under the mortgage thereof given by her.



The question raised by the ruling complained of is whether such fixtures, so annexed to the freehold, remained personal property so as to enable the mortgagor to maintain trover against the purchaser of the real estate at the mortgagee's sale, for refusal to give them up on demand.

<sup>625</sup> There is considerable conflict in the authorities as to whether such fixtures pass by a conveyance of the land on which they are placed or with which they are connected. Under the New York decisions, gas fixtures which are screwed onto the gas-pipes of a building are held not to be so attached to the building as to form part of the realty. The decisions there seem to proceed upon the ground that such fixtures as are capable of being easily detached from the building without physical injury thereto are mere furniture, and therefore not appurtenances to the building: See *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38, 37 Am. Rep. 471, and cases cited. In *Vaughen v. Haldeman*, 33 Pa. St. 522, 75 Am. Dec. 622, it was held that gas fixtures attached to the gas-pipes by the owner of the premises were mere personal chattels, and not fixtures in the proper sense of the term, and hence did not pass by a sheriff's deed of the real estate. In partial support of the opinion the court cites *Lawrence v. Kemp*, 1 Duer, 363, where it was decided that gas fixtures, when placed by a tenant in a shop or store, although fastened to the building, are not fixtures as between landlord and tenant; and also *Wall v. Hinds*, 4 Gray, 256, 64 Am. Dec. 64, where it was held that a lessee could take away gas-pipes put in by him into a house, leased to him for a hotel, and kept in place in the rooms by metal bands, though some of them passed through wooden ornaments of the ceiling, which were cut away for their removal. From the fact that the court cited these cases, it would seem that it took the view that substantially the same rule obtains regarding fixtures between vendor and vendee of real estate as obtains between landlord and tenant, which is clearly not so. The other case cited in support of the opinion, viz., *Montague v. Dent*, 10 Rich. 135, 67 Am. Dec. 572, was clearly in point, as there it was held that gas fixtures, such as chandeliers and side brackets, attached to the gas-pipes by the owner of the premises, were mere personal property and not fixtures, and hence did not pass by a sheriff's sale of the real estate to which they were attached.

In Minnesota the same rule obtains as to gas fixtures, although the court, while holding that they are not part of the realty, admits that it is only by reason of an arbitrary and <sup>626</sup>

inconsistent exception, which has been established by the authorities, that it feels called upon to so hold. The court says that the distinction between radiators, which it holds to be part of the realty, and gas fixtures is not clear in principle: See *Capehart v. Foster*, 61 Minn. 132, 52 Am. St. Rep. 582, 63 N. W. 257.

In speaking of radiators the court says: "Such radiators are an essential part of such plant, and are rarely furnished by tenants or temporary occupants of buildings as a part of the furniture brought with them or carried away with them, but the owner who furnishes the rest of such plant usually furnishes the radiators also. When, under ordinary circumstances, the owner of the building attaches such radiators to his steam plant, it should be held that he intended them to be permanently annexed to the realty. We are cited to *National Bank v. North*, 160 Pa. St. 303, 28 Atl. 694, which holds to the contrary. This case holds that such radiators are analogous to gas fixtures, and therefore not a part of the realty. By following the same process of reasoning by analogy you would strip a house of all modern improvements, and by continuing the process you would overturn the greater part of the law of fixtures. A correct rule should not, in this manner, be overturned by an inconsistent exception." The court did hold, however, that the electric annunciator, which was attached to the wall and to all the wires of the electric-call or electric-bell system of the hotel, was a part of the realty.

Massachusetts decisions are classed, in the *American and English Encyclopedia of Law*, volume 13, new edition, 666, with those which hold that gas fixtures are not a part of the realty as between vendor and vendee, and the plaintiff's counsel cites *Guthrie v. Jones*, 108 Mass. 191, and *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353, in support of this view. The first-named case is clearly not in point, as it was a case between landlord and tenant. And moreover it appears, by the second opinion given in the case (see page 195), that the first one was materially modified.

The second case, while it holds that gas fixtures are in the nature of furniture and do not lose their character as chattels 627 by being affixed to the house by screws and cement, is not clearly in point as an authority in the case before us, for the reason that the gas fixtures and other fixtures in question in that case were purchased and affixed to the house by the plaintiff, who was not the owner thereof, but who had taken posses-

sion under a mere verbal agreement for the purchase thereof. No deed was ever given, and the question which arose in the case was whether the gas fixtures, portable furnace, and certain other things which the plaintiff had attached to the house during the time of his occupancy thereof became part of the realty, and the court held that they did not. The fact that the court in support of its opinion cited *Guthrie v. Jones*, 108 Mass. 191, would seem to indicate that it treated the case before it as one between landlord and tenant rather than as one between a vendor and vendee of real estate.

*McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12, is more nearly in point as an authority for the plaintiff, and it may be that the language there used by the court is broad enough to include gas fixtures in the category of articles which do not become part of the realty by being affixed thereto. Like the case before us, it was one where the rights of the parties were to be determined by the rules which apply between mortgagor and mortgagee upon a foreclosure sale of the realty. The court says: "Many things which, as between landlord and tenant, would be removable as chattels are regarded as part of the realty in favor of a mortgagee. In ascertaining what articles have become part of the realty, regard must be had to the manner in which, the purpose for which, and the effect with which they are annexed. . . . Whatever is placed in the building by the mortgagor to carry out the obvious purpose for which it was erected, or to permanently increase its value for occupation, becomes part of the realty, though not so fastened that it cannot be removed without serious injury either to itself or to the building. On the other hand, articles which are put in merely as furniture are removable, though more or less substantially fastened to the building. So, too, machines not essential to the enjoyment and use of <sup>628</sup> a building, occupied as a manufactory, nor especially adapted to be used in it, are removable, though fastened to the building, when it is clear that the purpose of fastening them is to steady them for use and not to make them a permanent part of or adjunct to the building."

But conceding that the Massachusetts decisions are in harmony with those of the other states above referred to, yet, as the contrary view is taken by other courts of last resort, and as we are not bound by any previous decision of our own court in the premises, we feel at liberty to adopt a different rule, and one which, as it seems to us, is more logical and more in keep-



ing with the true idea as to what constitutes and goes to make up real estate as between the vendor and vendee thereof.

We think the correct rule of law in such cases is the common-law rule, viz.: That whatever is once annexed to the freehold which is designed by the owner thereof to be used and enjoyed in connection therewith becomes a part of the realty and passes with the conveyance thereof: *Græme v. Cullen*, 23 Gratt. 290. And although this rule does not obtain, as between landlord and tenant, in relation to articles attached to the freehold for ornamental or domestic use, and also with regard to trade fixtures, so called, yet that it does obtain and should be strictly enforced as between vendor and vendee. It is doubtless true that, as a general thing, a tenant may remove whatever he has added to the realty when he can do so without injury to the freehold, "unless," as said by Field, J., in *Sands v. Pfeiffer*, 10 Cal. 264, "it has become by its manner of addition an integral part of the original premises. But not so a vendor. As against him, all fixtures pass to his vendee, even though erected for the purposes of trade and manufacture, or for ornament or domestic use, unless specially reserved in the conveyance." And the same strict rule which applies between heir and executor applies equally between vendor and vendee and between mortgagor and mortgagee: 2 Kent's Commentaries, 411-413.

We are aware that it has been held in some cases that in order to give chattels the character of fixtures they must be <sup>629</sup>so affixed to the realty that they cannot be removed without physical injury thereto; but we think the better opinion, as well as the better reason, is the other way, and in favor of regarding everything as a fixture which has been attached to the realty with a view to enhance the value thereof and for the purpose of being permanently used in connection therewith. Nor is it necessary that the intention of the owner in affixing such articles should be expressed in words, for it may be, and ordinarily should be, inferred from the nature of the articles affixed, the relation and situation of the parties interested, the policy of the law in respect thereto, the mode of annexation, and the purpose or use for which it is made: *Hutchins v. Masterson*, 46 Tex. 554, 26 Am. Rep. 286. Under the old law the principal test as to what was or was not a fixture was said to be the nature of the physical attachment to the soil. But this theory has long since been exploded. And, as said by Mr. Washburn in his work on Real Property, volume 1, fifth edition, 22: "While

courts still refer to the character of the annexation as one element in determining whether an article is a fixture, greater stress is laid upon the nature and adaptation of the article annexed, the uses and purposes to which the land is appropriated at the time the annexation is made, and the relations of the party making it to the property in question, as settling that a permanent accession to the freehold was intended to be made by the annexation of the article": See, also, *Davis v. Mugan*, 56 Mo. App. 311; *Ewell on Fixtures*, 43, and cases in note 2.

In other words, the question whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold than upon their own nature and their adaptation to the purposes for which they are used: See the leading English case of *Elwes v. Mawe*, 2 *Smith's Lead. Cas.*, 8th ed., 169, and note.

In *Farrar v. Stackpole*, 6 *Greenl.* 157, 19 *Am. Dec.* 201, the court said: "Modern times have been fruitful of inventions and improvements for the more secure and comfortable use of buildings as well as of many other things which administer to the enjoyment of life. Venetian blinds, which admit the air and <sup>630</sup> exclude the sun whenever it is desirable so to do, are of modern use; so are lightning rods, which have become common in this country and in Europe. These might be removed from the building without damage; yet, as suited and adapted to the building upon which they are placed and as incident thereto, they are doubtless part of the inheritance and would pass by a deed as appertaining to the realty."

In *Johnson v. Wiseman*, 4 *Met. (Ky.)* 357, 83 *Am. Dec.* 475, the question arose whether chandeliers and gas fixtures passed by the sale of the house in question, and it was held that they did. The court said: "There can be no doubt that, upon the sale of the freehold, fixtures will pass, in the absence of any express provision to the contrary." Speaking of the fixtures in question, the court said: "Purchasers and strangers seeing them in their appropriate places, and no objections made to the sale, would regard them as a part of the freehold, and would bid for the property with the belief that the acquisition of it would confer upon them the right to these articles, which, from their nature and position, seemed to be incident to and part thereof, and thereby be induced to bid more than they would otherwise have done."

Walmsley v. Milne, 7 Com. B., N. S., 115, is a strong authority for the principle that where an article is once affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as a part of the realty, at all events where the object of setting up the articles is to enhance the value of the premises to which they are annexed for the purposes to which those premises are applied: See, also, Holland v. Hodgson, L. R. 7 Com. P. 328; Parsons v. Copeland, 38 Me. 537; Strickland v. Parker, 54 Me. 263; Price v. Brayton, 19 Iowa, 311; Teaff v. Hewitt, 1 Ohio St. 511, 69 Am. Dec. 634; State Sav. Bank v. Kercheval, 65 Mo. 682, 27 Am. Rep. 310; Pea v. Pea, 35 Ind. 387; Fechet v. Drake (Ariz., 1887), 12 Pac. 694; Arnold v. Crowder, 81 Ill. 56, 25 Am. Rep. 260.

Adopting the general rule, then, as we do, that, as between the vendor and vendee of real estate, whatever has been physically annexed or affixed thereto by the owner, under the conditions aforesaid, becomes part and parcel thereof and passes with the conveyance of the estate, it follows that the <sup>631</sup> electric light fixtures in question, which take the place of and serve the same purpose as ordinary gas fixtures, passed to the defendant by the conveyance referred to, and hence that the ruling complained of was erroneous. We can see no reason whatever why such fixtures are not as much a part of the realty as radiators, water-faucets, set-tubs, bath-tubs, and bowls, portable furnaces connected with hot-air pipes for heating the building, storm-doors and storm-windows, window-blinds, whether inside or outside, fire-grates, pumps, mantels, and such other things as are annexed to the freehold with a view to the improvement thereof. All of these things, though mere chattels before their annexation to the freehold, are no longer such after their annexation, any more than the other materials which go to make up the house, but then become part and parcel of the real estate. And the mere fact that they can be removed therefrom without physical injury to the freehold does not change their character as between the vendor and vendee of the realty.

That the authorities upon the question as to what are fixtures in cases of this sort are hopelessly at variance is apparent upon even a casual examination thereof. Indeed, it has frequently been said that there is no other legal term, in so general use as the word "fixtures," to which there has been more different and contradictory significations attached: Ewell on Fixtures, 1. We are therefore at liberty, as before suggested, to



follow that line of decisions which seems to us the most reasonable and logical; and the conclusion already stated has been reached in that way.

In relation to the statement hereinbefore made, to the effect that we are not bound by any former decision of our own court in the premises, it is proper to say that we have not overlooked the definition of the term "fixtures" as laid down by Greene, C. J., in *Providence Gas Co. v. Thurber*, 2 R. I. 15, 55 Am. Dec. 621. But as that was not a case where the gas company owned the land in which the pipes in question were laid, it is not opposed to the view which we have now taken. Indeed, it rather supports our view, as the court said that: "If <sup>632</sup> the gas company owned the land in which the pipes were laid, we should have no doubt they would be fixtures."

Another ground upon which the defendants ask for a new trial is that the damages awarded by the jury were excessive. We think it is clear that this ground is also well taken. The amount awarded was one thousand and sixty-nine dollars and eighty-seven cents, which is the exact footing of the schedule values of the long and promiscuous list of articles which the plaintiff attached to her declaration. As to many of these articles, there is no sufficient evidence that they ever came into the defendants' possession; as to others, it is very clear from the evidence that they were included in the personal property mortgage to Mrs. Owen, which mortgage had been foreclosed by her before the commencement of this action; and as to nearly all of the articles, it is evident that the prices fixed thereon by the plaintiff are greatly in excess of their real value. The diamond ring, for which the jury allowed the plaintiff three hundred dollars, had been pledged by the plaintiff, according to her own testimony, to Mrs. Owen as security for a loan, which loan had not been paid, and hence, of course, trover would not lie for it; and the bath-tub and coal-grate sued for were evidently part of the realty under the rule aforesaid. Moreover, as to the bath-tub, although there was not a word of testimony offered concerning its value, the jury allowed the sum of one hundred dollars therefor. The evidence also shows that the plaintiff was in possession of most of the articles sued for at the time she made the demand therefor upon the defendants, and that she could then have removed the same from the premises if she had seen fit. This being so, the demand and refusal as to them did not constitute trover. In short, under the evidence sub-

mitted, we think that in no event can the plaintiff recover except as to a very few and relatively unimportant part of the articles mentioned in said schedule.

Petition for new trial granted.

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**Fixtures.**—Gas and electric light fixtures and globes have been held not to be fixtures as between mortgagor and mortgagee: *Hall v. Law Guarantee etc. Soc.*, 22 Wash. 305, 79 Am. St. Rep. 935, 60 Pac. 643.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**WISCONSIN.**

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**FULLER-WARREN COMPANY v. HARTER.**

[110 Wis. 80, 85 N. W. 698.]

**ELECTION OF REMEDIES.**—A party does not make an election between inconsistent remedies unless he in fact has such remedies. Hence the institution of a fruitless action, which a party has no right to maintain, will not preclude him from asserting the rights he really possesses.

**FIXTURES—RETAINING CHARACTER AS PERSONALTY.**—Parties may by agreement retain a fixture in its character as personalty notwithstanding its physical annexation to a building.

**FIXTURES.—TO CHANGE PROPERTY FROM ITS CHATTEL CHARACTER** to that of real estate, it is necessary that there should be physical annexation of the chattel to the realty, adaptation of the improvement to the use to which the realty is devoted, and intent of the person causing the annexation to make a permanent improvement of the freehold.

**FIXTURES—CHATTEL MORTGAGE—RIGHTS OF REALTY MORTGAGEE.**—Personal property incorporated into a mortgaged building, with the intent to make it a permanent part thereof, becomes a part of the mortgaged security, notwithstanding the vendor reserves a chattel mortgage thereon to secure payment, where the real estate mortgagee is not a party to the transaction.

**FIXTURES—CHATTEL CHARACTER—REMOVAL WITHOUT INJURY—RIGHTS OF VENDOR AND MORTGAGEE.**—A vendor of chattels, which are permanently annexed to mortgaged realty, cannot by agreement with the mortgagor preserve such chattels in their character as personalty as against the mortgagee, even though they may be removed without injury either to the realty or to the value of the mortgage security as it existed before the annexation.

Action for the wrongful conversion of personal property. Plaintiff sold to one Shurts a hot-air furnace which was annexed to her dwelling-house on which there was a mortgage, under



a contract providing that if it failed to work satisfactorily plaintiff could remove it. The furnace did not work well, and plaintiff was told to remove it. But plaintiff sued to recover on the contract and failed to recover. The real estate being sold under mortgage, plaintiff sued the one in possession of the property to recover possession of his furnace.

Tuller & Lockney and D. D. Tuller, for the appellant.

Winkler, Flanders, Smith, Bottum & Vilas, C. F. Fawsett, and J. G. Flanders, for the respondent.

**82 MARSHALL, J.** The first point made by appellant that is deemed sufficiently important to be worthy of consideration is, that plaintiff, having elected to sue upon the contract when a way was open to treat it as at an end and to take the property in controversy, was legally bound thereby, and that the trial court should have so held by dismissing this action. The rule is quite familiar that a person cannot have the benefit of two inconsistent remedies or causes of action; that when there are such, either of which will remedy the wrong against him, the choice of one forever waives the other. Many applications of that have been made by this court: *Warren v. Landry*, 74 Wis. 144, 42 N. W. 247; *Crook v. First Nat. Bank*, 83 Wis. 31, 35 Am. St. Rep. 17, 52 N. W. 1131; *Bank of Lodi v. Washburn etc. Co.*, 98 Wis. 547, 74 N. W. 363; *Carroll v. Fethers*, 102 Wis. 436, 78 N. W. 604. It was very recently quite thoroughly discussed in *Barth v. Loeffelholz*, 108 Wis. 562, 84 N. W. 846. Does that rule apply where a person, supposing he has two causes of action for the satisfaction of his claim, when he in fact has but one, sues upon the supposed cause which has no existence, and is defeated on that ground? Is he under such circumstances precluded from suing upon the only cause of action which he in fact had? The proposition of appellant's counsel is, that because plaintiff sued upon the contract, supposing it had a cause of action thereon, and was defeated because the contract had been rightfully rescinded by defendant's predecessor, leaving <sup>83</sup> the subject thereof the property of respondent, it must nevertheless lose the same because another remedy is necessary to its recovery; that while it was defeated because the subject of the action was not the property of Mrs. Shurts, it is in any event powerless to claim the thing which, by the judgment of the court, it owns. That seems to be unreasonable. If the doctrine as to the effect of an election between two inconsistent causes of action goes that

far, it is certainly liable to cause great injustice in some cases. That, of itself, without investigation, suggests that it does not go that far. We should hesitate to sustain counsel's theory if the question involved was new, but it is not.

The same seemingly unreasonable application of the rule, as regards the effects of an election between inconsistent remedies, as that contended for here, has been several times insisted upon in other courts, as appears from reported cases, and always unsuccessfully. In *Morris v. Rexford*, 18 N. Y. 552, the circumstances were that plaintiff sold a quantity of oats to the defendant, payment therefor to be made on delivery. The delivery was made, but the purchase price was not paid. After some delay the plaintiff endeavored to rescind the sale contract and brought replevin. Subsequently he sued for the purchase price of the oats. On the trial it did not appear that recovery was had in the replevin action or what had become of the same. The court held that the mere commencement of the replevin action did not necessarily preclude plaintiff from prosecuting the action on the sale contract; that whether there was an election of remedies within the meaning of the rule on that subject depended upon whether the plaintiff had in fact two remedies; that if he had but one, the pursuit of one that he did not possess would not bar him from subsequently resorting to the one which he did possess. In *Kinney v. Kiernan*, 49 N. Y. 164, the court stated the rule in these words: "The institution by a party of a fruitless action, which he has not the right <sup>84</sup> to maintain, will not preclude him from asserting the rights he really possesses." In *McNutt v. Hilkins*, 80 Hun, 235, 49 N. Y. Supp. 1047, the decision was based on that in the preceding case cited. The rule declared substantially fits the exact facts of this case. The syllabus states it briefly as follows: "An action brought for the conversion of personal property, wherein it was successfully maintained by the defendant that the title to the personal property alleged to have been converted was in him and in which judgment was rendered in his favor, is not a bar to a subsequent action between the same parties brought to recover damages for breach of the contract of the sale of such property."

In reaching such conclusion the court used the following language as to the contention of the losing party: "The defendants, by their contention, succeeded in establishing that there had been an absolute sale, and that, therefore, the plaintiff had mistaken her remedy, and they cannot now set up the

judgment which they then obtained to prevent the plaintiff recovering the purchase price of the property which they formerly urged and established was sold to them by her, and which it is conceded they have not paid for, and thus not only retain the property, but also the purchase price." To the same effect are *In re Van Norman*, 41 Minn. 494, 43 N. W. 334; *Gould v. Blodgett*, 61 N. H. 115.

In applying the rule as regards the effect of a choice between two inconsistent remedies or causes of action, it must be kept in mind that there must be two such remedies or causes of action, in fact, before a choice can be made within the meaning of the rule. A misconception of remedies should not be mistaken for an election between inconsistent remedies. Here there was no remedy upon the contract. Mrs. Shurts recovered of plaintiff upon that ground. Such recovery effectively answers the suggestion that the resort to the supposed remedy stands in the way of insisting upon the only remedy plaintiff had. Not only is plaintiff not bound as having made an election of one of two inconsistent <sup>85</sup> remedies, but Mrs. Shurts, and appellant claiming under her, are estopped by the former judgment from asserting to the contrary or that the property in dispute was not the property of respondent, at least as between it and Mrs. Shurts, and as between it and the appellant, unless the fact be otherwise because as against him the heating plant became a part of the real estate and passed to him under the foreclosure sale.

So, as between Mrs. Shurts and respondent, the heating plant is personal property, notwithstanding its physical annexation to the building it was designed to heat. The plant was not simply set up in Mrs. Shurts' building on trial. It was actually sold and delivered to her and placed in her building to remain there as an improvement thereof, subject to the guaranty of its efficiency. The parties were competent to preserve its character as personalty, between themselves. That does not admit of a question: *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. 568; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554; *Keefe v. Furlong*, 96 Wis. 219, 70 N. W. 1110. They accomplished that, though the relations of vendor and vendee between them were not severed by resorting to the contract in that regard, but by the use by Mrs. Shurts of her remedy for the breach of warranty.

Did the heating plant become a fixture as to the mortgagee? That is the important question. That there was an intent



on the part of respondent and Mrs. Shurts that it should be incorporated into and made a part of the building, subject to the right of the former to reclaim the same in case of inability to make the apparatus do the work guaranteed, is unquestioned. As before indicated, the contract of sale contemplated physical annexation of the plant to and incorporation of it with the building it was designed to heat as a permanent improvement thereof, reserving the right to remove it as a mere security against losing the property as well as the pay for it if it failed to satisfy the warranty.<sup>86</sup> All the essentials to change the chattel character of the property to real estate were satisfied, viz., physical annexation of one to the other, adaptation of the improvement to the use to which the realty was devoted, and intent of the person causing the annexation to make a permanent improvement of the freehold: Tyler on Fixtures, 114; Gunderson v. Swarthout, 104 Wis. 186, 76 Am. St. Rep. 860, 80 N. W. 465. The relations between the parties after the plant was set up were substantially the same as they would have been had respondent sold it under an agreement that the title thereto should not pass to the vendee till it was paid for, and if payment was not made respondent should have the right to remove it from the building, doing no more injury thereto than necessary. Counsel for appellant claim that personal property incorporated into mortgaged realty under such circumstances, and without the mortgagee being a party to the transaction, becomes a part of the mortgage security, and cite many authorities to support that view. Counsel for respondent claim that in such circumstances, where the accession can be severed from the realty without injury to the latter or to the value of the security for the mortgage debt as it stood before the improvement was made, the same character is impressed upon the accession as between the vendor and the mortgagee as between the vendor and mortgagor; in other words, that it does not become real estate, and may be severed from the realty and removed without invading the rights of the mortgagee. The learned trial court so held and there is ample authority to support that view, to some of which counsel for respondent have referred us. The difficulty is that there are two well-defined doctrines on the subject, one being directly opposed to the other. In many jurisdictions the doctrine contended for by appellant's counsel prevails, and in many others that contended for by respondent's counsel prevails. The former view is maintained by the following of the numerous authorities that might<sup>87</sup> be cited: Miller v. Wilson, 71 Iowa, 610, 33 N. W.

128; *Clary v. Owen*, 15 Gray, 522; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Southbridge Sav. Bank v. Mason*, 147 Mass. 500, 18 N. E. 406; *Meagher v. Hayes*, 152 Mass. 228, 23 Am. St. Rep. 819, 25 N. E. 105; *Watertown etc. Co. v. Davis*, 5 Houst. 192; *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. 14; *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21. The latter view is as firmly maintained by the following of many authorities that might be mentioned: *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; *Binkley v. Forkner*, 117 Ind. 185, 19 N. E. 753; *Hill v. Sewald*, 53 Pa. St. 271, 91 Am. Dec. 209; *Crippen v. Morrison*, 13 Mich. 23; *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655; *German etc. Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224; *Northwestern etc. Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028, 1064.

In *Clary v. Owen*, 15 Gray, 522, the Massachusetts court, speaking by Mr. Justice Hoar, said: "We think it is not in the power of the mortgagor, by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold, which as between mortgagor and mortgagee would become a part of the realty."

In *Meagher v. Hayes*, 152 Mass. 228, 23 Am. St. Rep. 819, 25 N. E. 105, the same court said that a building put on mortgaged land and annexed to it in the usual way, without the mortgagee being a party to the transaction, became a part of the mortgage security notwithstanding an agreement between the owner of the building and the mortgagor that it should remain personal property with the right of such owner to remove it, and that the purchaser of the land at the foreclosure sale became the owner of such building, though he bought with notice of such agreement. In *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. 14, the supreme court of Maine, speaking by Mr. Justice Whitehouse, said: "When machinery is sold and placed in a building for the purpose of making it available as a manufactory and permanently increasing its value for occupation, an agreement <sup>88</sup> between the seller and buyer that the title shall remain in the former until it is wholly paid for, will not bind or affect the mortgagee of the realty without notice, and such machinery will pass to the mortgagee as a part of the realty."

On the other hand, in *German etc. Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224, the supreme court of Washington said that material sold and used in the construction of a building lo-

cated upon mortgaged real estate, under an agreement with the mortgagor that the seller shall retain the title to such material till paid for, with the right to remove the same in case of nonpayment, does not become a part of the building and realty so that the mortgage lien will attach thereto as against the seller, if such material can be removed from the building without injury thereto. Similar language was used by the Minnesota court in *Northwestern etc. Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028, 1064, where it was held that an apparatus, which formed a necessary part of a cold-storage plant and was attached to the storage building subsequent to the execution of a mortgage thereon, under an agreement between the vendor of the apparatus and the mortgagor that the former should retain the title thereto till it should be paid for, and have the right to remove the same in case of default, did not become a part of the mortgaged realty, but remained personal property during the existence of the condition, as against both mortgagor and mortgagee, since its removal from the building to which it was attached was shown to be practical without injuring such building or the value of the mortgage security as it existed before the apparatus was placed therein. The other cases cited to that doctrine are to the same effect. Probably the leading case on the subject is *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279, where the two doctrines are discussed at great length.

The rule that a contract between a mortgagor of real estate and his vendor of chattels, to be and which are actually wrought into such real estate as an improvement thereof, <sup>89</sup> will preserve the chattel character of the accession, does not militate against the mortgage attaching thereto as a part of the security if the mortgagee is not a party to such agreement, is referred, for its original support in this country, most generally to the supreme court of Massachusetts, and it is sometimes called the Massachusetts rule. If it applies to this case, the finding that it is practicable to remove the heating plant from the appellant's building is immaterial, and the judgment appealed from is wrong.

It seems that this court adopted the so-called Massachusetts rule at a very early day, in *Frankland v. Moulton*, 5 Wis. 1, where the opinion was delivered by Chief Justice Whiton, citing *Winslow v. Merchants' Ins. Co.*, 4 Met. 306, 38 Am. Dec. 368, *Corliss v. McLagin*, 29 Me. 115, and *Butler v. Page*, 7 Met. 40, 39 Am. Dec. 757. The circumstances in the *Frankland* case were that machinery was sold to the owner of the real



property while it was encumbered by an equitable mortgage, to be attached to such realty as an improvement thereof, the vendor of the machinery retaining a chattel mortgage interest therein to secure the payment of the purchase money. It was held that the chattel mortgage was wholly inoperative as against the holder of the equitable mortgage; that the agreement between the chattel mortgagee and mortgagor, preserving the chattel character of the machinery after it was physically attached to and had become an appropriate improvement of the building in which it was located, was effective only between the parties to such mortgage. In *Kendall Mfg. Co. v. Rundle*, 78 Wis. 150, 47 N. W. 364, a chattel mortgage was taken, by the vendor of a heating plant set up in a building, to secure the purchase money of such plant, and it was held that the chattel mortgage was not effective to preserve the chattel character of the heating plant as against prior lien claims upon the property. The very opposite was held in *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279, the leading New Jersey case to which we have referred, where several Massachusetts<sup>90</sup> cases that have received the approval of this court were reviewed and rejected as unsound. *Frankland v. Moulton*, 5 Wis. 1, in principle, covers the whole subject under discussion. It does not appear ever to have been criticised here since it was decided, but has been repeatedly approved as stating the true rule: *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. 568; *Taylor v. Collins*, 51 Wis. 123, 8 N. W. 22; *Kendall Mfg. Co. v. Rundle*, 78 Wis. 150, 47 N. W. 364; *Homestead etc. Co. v. Becker*, 96 Wis. 206, 71 N. W. 117; *Gunderson v. Swarthout*, 104 Wis. 186, 76 Am. St. Rep. 860, 80 N. W. 465.

The judicial policy of this state having been established for nearly half a century, as indicated, it is considered that we are not permitted to question it now. The opposite doctrine may be the most equitable. It is probably supported by the greater weight of authority if that is to be determined by the number of decisions. Possibly it may be by the better reasoning, though the indications, it is believed, from a study of the numerous cases that have dealt with the subject in recent years, are that it has been losing rather than gaining ground. The tendency of courts is to fence it within as narrow limits as practicable. For example, in *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21, decided in 1892, the Massachusetts rule, so called, was adopted in its entirety, with the possible exception of where an interest in the accession to realty is reserved as security for purchase money. In all other cases it was distinct-

ly said that a contract between a mortgagor and a third person, preserving the chattel character of property added to real estate as an improvement thereof during the life of the mortgage thereon, is ineffective as against the mortgagee unless he is a party to the transaction; and that the question of whether it can or cannot be removed without injury to the realty is immaterial. What reason there is for saying that a contract between a vendor of chattels and a mortgagor of real estate, in regard to the character of the former after being incorporated into the latter, shall be binding on the mortgagee <sup>91</sup> in one case and not in another, when the mortgagor is left in the same position, without the benefit of the accession to the realty, in one case as in the other, is not easily perceived. *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21, seems to limit or overrule some early New York cases cited by the New Jersey court as supporting authorities. The general rule stated in the New York court is in perfect harmony with the holdings of the Massachusetts court. It is as follows: "The lien of the mortgage covers all that was realty when he accepted the security, and all accessions to the realty except when, by a valid agreement to which he is a party, the character of chattels is impressed upon them."

The invalidity of a contract between a mortgagor of realty and his vendor of chattels to be annexed and which are annexed to the mortgaged property, preserving the chattel character of the accessions, has been recently repeatedly maintained by the federal courts: *Phoenix etc. Co. v. New York etc. Co.*, 83 Fed. 757; *Porter v. Pittsburg etc. Co.*, 120 U. S. 649, 7 Sup. Ct. Rep. 741, 122 U. S. 283, 7 Sup. Ct. Rep. 1206.

In a New Jersey case decided in 1898—*General etc. Co. v. Transit etc. Co.*, 57 N. J. Eq. 460, 42 Atl. 101—a conclusion was reached contrary to that of the federal supreme court in the case last above cited, such court's decision being vigorously attacked as promulgating an unsound doctrine. The difficulty is that the judicial policy of the federal court, indicated in the several cases cited, and the other courts that are in harmony therewith, is one way, while that of the New Jersey court and others in harmony with its policy is the other. Each court having adopted a policy for its jurisdiction, for it that policy is the proper one and the opposite policy is unsound. An expression in *Phoenix etc. Co. v. New York etc. Co.*, 83 Fed. 757, may be cited as indicating clearly that, where the doctrine prevails that the vendor of chattels to be attached to real estate cannot control their character after the accession

is made, as against the mortgagee of the realty, <sup>92</sup> by a contract with the mortgagor, the question of whether such accession can be severed from the realty without injury thereto is of no significance. Clark, district judge, in delivering the opinion of the court of appeals, said: "The determination of the case does not depend on any narrow question of mere physical injury to the building in the removal of the machinery placed therein."

Walker v. Grand Rapids etc. Co., 70 Wis. 92, 35 N. W. 332, is cited to our attention by respondent's counsel with confidence, but we think it has no application to the facts of this case. There an apparatus for a gristmill was consigned by the manufacturer to a contractor who was engaged in building over the mill for the owner, with permission to set it up for trial. There was no sale, conditional or otherwise. The owner of the apparatus did not part with the title or have any intention of adding the apparatus to the mill as a permanent improvement thereof, conditional or otherwise. If there had been no sale of the heating plant in question, conditional or otherwise, but a mere permission obtained of Mrs. Shurts to set it up in her house and test it, there would be some analogy between this case and Walker v. Grand Rapids etc. Co., 70 Wis. 92, 35 N. W. 332. Whether it could be removed under such circumstances might depend upon whether the removal would materially injure the building to which it was attached. The trouble is that it was actually sold and delivered to Mrs. Shurts. The title thereto passed to her. She afterward divested herself of the title, as between herself and respondent, by rescinding the sale contract for breach of warranty, as before indicated.

There appears to be no legitimate way open to us to decide otherwise than that the trial court adopted the wrong doctrine in reaching a conclusion in this case. It was made to turn upon two facts: 1. The heating plant is personal property as between the mortgagor and respondent because of the contract between them; 2. It is of the same character <sup>93</sup> as regards appellant claiming under the mortgage, because it can be removed without any material injury to the realty. Those facts are entirely immaterial, since the title to the heating plant was vested in Mrs. Shurts and set up in her building as a permanent improvement thereof, subject to the contract right reserved to remove it, as a mere security against loss thereof to the vendor in case it failed to satisfy the warranty. The intention



that the plant should actually be incorporated into the realty, regardless of the conditional right reserved, satisfied the element of intent necessary to make the plant realty as between the vendor thereof and the mortgagee of such realty. As soon as the accession to the realty took place, the mortgage lien attached thereto and could not thereafter be removed without either payment of the mortgage or the mortgagee's consent. The rule stated in *Homestead etc. Co. v. Becker*, 96 Wis. 206, 71 N. W. 117, applies. There being no intention to remove the chattel when it was attached to the realty, it passed to appellant under the mortgage, who acquired title by the foreclosure thereof, and this although it was capable of being removed without injury to the building. Mr. Justice Pinney, in so stating the rule, cited in support thereof *Frankland v. Moulton*, 5 Wis. 1, and one of the leading Massachusetts cases.

By the Court. The judgment is reversed, and the cause remanded with directions to render judgment in defendant's favor for costs.

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**WHEN AND AGAINST WHOM FIXTURES MAY, BY AGREEMENT, RETAIN THE CHARACTER OF PERSONAL PROPERTY.**

- I. Who May Make Agreement.
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  - g. Purchaser or Mortgagee of One Who Annexes the Fixture.
  - h. Lessor of Realty.
    - i. Remaindermen.
    - j. Lienholders.

**I. Who May Make Agreement.**—Practically anyone capable of contracting and who is interested in the property may make an agreement respecting the chattel character of fixtures. A wife could not, at common law, contract with her husband; hence when he, as tenant by the curtesy, erected buildings on her land under an agreement with her that they should remain personal property, such agreement does not alter their distinctive character as fixtures: *Doak v. Wiswell*, 38 Me. 569; *Washburn v. Sproat*, 16 Mass. 449; *Marable v. Jordan* 5 Humph. 417, 42 Am. Dec. 441. If the wife had a trustee, it seems that the husband might contract with the trustee so as to reserve to himself the value of the improvements he puts on his wife's land: *Marable v. Jordan*, 5 Humph. 417, 42 Am. Dec. 441. A guardian of an infant cannot contract with himself, or give himself consent to erect a building on his ward's land which will retain its personal character. Such a building becomes a permanent annexation to the realty, in whatever manner it may be attached to the soil: *Copley v. O'Neill*, 1 Lans. 214, 39 How. Pr. 41, 57 Barb. 299.

**II. Time and Character of Agreement.**—As between the parties thereto, an agreement providing that fixtures shall retain their personal character may be made at any time, either before or after they are annexed to the realty: *Fuller v. Tabor*, 39 Me. 519; *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125. Chattels, which by annexation to the land have become fixtures, may be reconverted into personalty, provided they have not been so incorporated into the realty as to lose their identity, and the reversion does not interfere with the rights of creditors or third persons: *Tyson v. Post*, 108 N. Y. 217, 2 Am. St. Rep. 409, 15 N. E. 316.

Generally speaking, an agreement that chattels affixed to realty shall retain their personal character may be either in writing or parol: *Broaddus v. Smith*, 121 Ala. 335, 77 Am. St. Rep. 61, 26 South. 34; *Tyson v. Post*, 108 N. Y. 217, 2 Am. St. Rep. 409, 15 N. E. 316; *Western etc. R. R. v. Deal*, 90 N. C. 110. Such an agreement does not usually relate to an interest in lands, hence it may be in parol without violating the statute of frauds: *Dubois v. Kelly*, 10 Barb. 496. The fixtures, by virtue of the agreement between the parties, remain separate from the freehold, and are personal property: *Curtis v. Riddle*, 7 Allen, 185; *Western etc. R. R. v. Deal*, 90 N. C. 110. In the case of buildings erected on another's land, if built with the consent of the land owner that they shall remain the personal property of the builder, the agreement may be oral, for in such a case the character of the buildings as personalty is fixed before the structures are attached to the realty. But if the building is erected before such consent is obtained, and after the structure has been affixed to the realty, its personal character cannot be established by parol evidence as against a subsequent grantee of the land: *Gibbs v. Estey*, 15 Gray, 587. And a parol reservation of a fixture, before or at the time of the delivery of a deed of the land, is inad-

missible to control the ordinary effect and operation of the deed: *Noble v. Bosworth*, 19 Pick. 314.

III. When No Agreement May be Made.—In general, it may be said that almost anything affixed to realty may, by agreement, be treated as personalty. Thus, it has been held that houses and other buildings, machinery, railroad tracks, nursery stock, and, indeed, practically everything which before annexation was personal property, may still retain their chattel character by an agreement to that effect: See, by way of illustration, *Merritt v. Judd*, 14 Cal. 60; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Osgood v. Howard*, 6 Greenl. 452, 20 Am. Dec. 322; *Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254; *Wall v. Hinds*, 4 Gray, 256, 64 Am. Dec. 64; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; *Hopewell v. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. Rep. 235, 23 N. E. 327; *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284. But the right to preserve the personal character of fixtures by agreement is limited to chattels which are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, or without destroying or materially injuring the realty to which they are attached: *Henkle v. Dillon*, 15 Or. 610, 17 Pac. 148; *Ford v. Cobb*, 20 N. Y. 344; *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; *Western Union Tel. Co. v. Burlington etc. Ry. Co.*, 11 Fed. 1; *Sword v. Low*, 122 Ill. 487, 13 N. E. 826. Thus, in *Ford v. Cobb*, 20 N. Y. 344, it was said that parties could not create a personal chattel interest in a part of the separate bricks, beams, or other materials of which the walls of a house were composed, and while admitting the right of parties to preserve the chattel character of fixtures in general, said that "there must necessarily be a limitation to this doctrine, which will exclude from its influence cases where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy. Thus, a house or other building, which, from its size or the materials of which it was constructed, or the manner in which it was fixed to the land, could not be removed without practically destroying it, would not, I conceive, become a mere chattel, by means of an agreement which could be made concerning it. So, of the separate materials of a building, and things fixed into the wall, so as to be essential to its support: it is impossible that they should by any arrangement between the owners become chattels." Similarly in *Sword v. Low*, 122 Ill. 487, 13 N. E. 826, the rule allowing fixtures to retain their chattel character by agreement was said not to apply "to such articles as enter into and form parts of a structure appurtenant to land, such as lumber, stone, and shingles, or to doors, windows, and grates, and the like articles which are incorporated into the structure, for their removal would, pro tanto at least, be a destruction of the



appurtenance. All these, and like articles thus used, lose their identity and become a necessary part of the building or other structure, and are clearly distinguishable from such articles as are, or may be, merely annexed to the freehold, or some appurtenant thereof, and which, retaining their individual characteristics, may be removed in their entirety, and without material injury." The extent, however, to which courts will go to sustain an agreement preserving the personal character of fixtures may be seen from *German Sav. etc. Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224, where an agreement that window and door sashes, doors, jambs, and trimmings, wainscoating, baseboards, and mantel pieces should be considered as personal property belonging to the materialman, was upheld as valid, where such fixtures could be removed without injury to themselves or to the realty. Even this case recognizes that an agreement of this kind cannot be made where the fixtures could not be removed without serious damage to the freehold, or substantially destroying their own value as merchandise. In *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279, it was intimated that while fixtures, which, if detached, would destroy the realty to which they were annexed, could not retain their chattel character so as to be removed, yet there might be an equitable method of awarding to the chattel lienholder the value of the fixture or the value which it added to the realty, and thus give some effect to the agreement preserving the personal character of the fixtures.

Another class of cases in which fixtures cannot be made personally by agreement seems to be recognized in *Havens v. Germania Fire Ins. Co.*, 123 Mo. 403, 45 Am. St. Rep. 570, 27 S. W. 718, and this is where the effect of such an agreement is to defeat the purpose of a statute. In such a case the agreement will not be given effect. In this case there existed a statute which made the amount of insurance written on real property conclusive as to its value, and the insurance company sought to free itself from a portion of its liability for real property destroyed by fire, by evidence of an agreement in the policy with the owner that certain fixtures were personal property. But the court held that its liability could not be evaded in this manner, as the agreement was against the policy and spirit of the statute. The statute was founded upon reasons of public policy, and where the provisions of the insurance policy ran counter to those of the statute, the statute must control. In *Prescott v. Wells, Fargo & Co.*, 3 Nev. 82, we seem to find the doctrine asserted that chattels cannot by any agreement retain their personal character, if they in fact become fixtures. "Property," said the court, "is either real or personal, according to its nature. Contract cannot make a chattel realty, nor realty a chattel." But this clearly is not the general rule so far as the parties to the agreement are concerned.

#### IV. Agreement Between the Parties.

**a. Express Agreement.**—If competent parties make an express agreement that fixtures shall retain their character as chattels, there can be no doubt that the agreement is binding as between them. Thus, where in a deed a fixture is expressly excepted from its operation, it is personalty, and does not pass as a part of the realty: *Badger v. Batavia Paper Mfg. Co.*, 70 Ill. 302. Parties to a contract for the purchase of a chattel to be affixed to realty may agree among themselves that it shall be treated as personalty: *Kaestner v. Day*, 65 Ill. App. 623. An agreement that a tenant may remove fixtures annexed by him is an agreement that they shall retain their chattel character: *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. 907; *Mott v. Palmer*, 1 N. Y. 564; *Parker v. Redfield*, 10 Conn. 490; *Kissam v. Barclay*, 17 Abb. Pr. 360. If the tenant has no right to remove a building erected by him, it is a fixture and part of the realty: *Deane v. Hutchinson*, 40 N. J. Eq. 83, 2 Atl. 292. a building erected by a tenant with a reserved right to remove it may, however, for some purposes, be considered as realty, though the agreement to remove it would stamp its character as personalty. Thus, it is held that where a tenant at will erects a building upon his landlord's real estate under an arrangement that he may remove it when required, the building is nevertheless considered as real estate so far as giving the tenant notice to quit is concerned, and such tenant is entitled to the regular six months' notice required in such cases: *Blanchard v. Bowers*, 67 Vt. 403, 31 Atl. 848.

**b. Implied Agreement.**—Most of the questions which arise concerning an agreement between the parties, however, do not relate to express agreements that a fixture shall be considered as personalty, but grow out of some arrangement whereby the law will imply an agreement to treat the annexation as a chattel. There are several situations from which the law will raise an implied contract that a fixture is to remain personal property as between the parties. The chief situations from which such agreement is implied are where the fixture is covered by a chattel mortgage, where a chattel has been conditionally sold to the one who annexes it to the realty, where a licensee places fixtures upon the property, and where a tenant annexes trade fixtures for the more convenient use of the property in connection with his business.

**1. Chattel Mortgages.**—Where one purchases an article to be annexed to the freehold, which, from its character, may, after annexation, be either realty or personalty according to the intention of the parties, the giving of a chattel mortgage thereon to the seller is sufficient evidence of an intention that the fixture shall retain its character as personalty: *Edwards etc. Lumber Co. v. Rank*, 57 Neb. 323, 73 Am. St. Rep. 514, 77 N. W. 765; *Arlington Mill etc. Co. v. Yates*, 57 Neb. 286, 77 N. W. 677. An agreement that the fixture shall retain its personal character is said to be implied from the

mere making of a chattel mortgage: *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; *Ford v. Cobb*, 20 N. Y. 344; *Tibbetts v. Horne*, 65 N. H. 242, 23 Am. St. Rep. 31, 23 Atl. 145; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Sword v. Low*, 122 Ill. 487, 13 N. E. 826; *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, *Warner v. Kenning*, 25 Minn. 173; *Burrill v. Wilcox Lumber Co.*, 65 Mich. 571, 32 N. W. 824; *Henkle v. Dillon*, 15 Or. 610, 17 Pac. 148. In *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, the execution of a chattel mortgage on machinery was regarded as an unequivocal declaration of the intention of the parties that the act of annexation should not change or take away the character of the machinery as personalty. The giving of a new chattel mortgage after the expiration of the first one does not in any manner affect the personal character of the fixture: *Andrews v. Chandler*, 27 Ill. App. 103. A chattel mortgagor cannot, by attaching the property to land, change the personal character of the property so as to make it a part of the realty and defeat the mortgage lien: *Miller v. Griffin*, 102 Ala. 610, 15 South. 238.

2. **Conditional Sales.**—The conditional sale of chattels which are affixed to realty preserves their personal character as between the parties to the agreement. The reservation of title in the vendor until the property is paid for preserves the chattel character of the property, which cannot be defeated by attaching it to realty: *Warren v. Liddell*, 110 Ala. 222, 20 South. 89; *Jenks v. Colwell*, 66 Mich. 429, 11 Am. St. Rep. 502, 33 N. W. 528; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Southbridge Sav. Bank v. Exeter Works*, 127 Mass. 542; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493; *Marshall v. Bachelidor*, 47 Kan. 442, 28 Pac. 168; *Duke v. Shackelford*, 56 Miss. 552; *General Elec. Co. v. Transit etc. Co.*, 57 N. J. Eq. 460, 42 Atl. 101; *Wade v. Donau Brew. Co.*, 10 Wash. 284, 38 Pac. 1009; *Buzzell v. Cummings*, 61 Vt. 213, 18 Atl. 93; *San Antonio Brew. Assn. v. Arctic etc. Co.*, 81 Tex. 99, 16 S. W. 797. Where a vendee of chattels under a conditional sale affixes them to the realty without the vendor's knowledge, they are still personal property, and may be reclaimed by the vendor: *Ingersoll v. Barnes*, 47 Mich. 104, 10 N. W. 127.

3. **Annexation by Licensee.**—Where one erects a building or annexes any fixture to real property by permission of the owner with the understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel and the property of the licensee who erected it: *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195; *Osgood v. Howard*, 6 Greenl. 452, 20 Am. Dec. 322; *Goodman v. Hannibal etc. R. R. Co.*, 45 Mo. 33, 100 Am. Dec. 336; *Ingalls v. St. Paul etc. Ry. Co.*, 39 Minn. 479, 12 Am. St. Rep. 676, 40 N. W. 524; *Powers v. Harris*, 68 Ala. 409; *Priestly v. Johnson*, 67 Mo. 632; *Fuller v. Ta-*



bor, 39 Me. 519; Aldrich v. Pearson, 6 N. H. 555; Adams v. Goddard, 48 Me. 212.

A building placed upon the land of another under a license need not be a trade fixture in order to retain its personal character and be removable by the builder: Weathersby v. Sleeper, 42 Miss. 732. The consent of the land owner to the erection of the building, it seems, need not be given prior to the erection of the building. A subsequent assent that it may remain will have the effect of making it personal property: Fuller v. Tabor, 39 Me. 519. Mere subsequent assent seems to be insufficient, however, without an actual severance of the building from the land: Madigan v. McCarthy, 108 Mass. 376, 11 Am. Rep. 371. A railway company may, by a license, enter and construct tracks on the real estate of another, and such tracks are the personal property of the company: Chicago etc. R. R. Co. v. Goodwin, 111 Ill. 202, 53 Am. Rep. 622; Cayuga Ry. Co. v. Niles, 13 Hun, 170. A grain elevator built upon the right of way of a railroad company under a license given by the company is personal property: Walton v. Wray, 54 Iowa, 531, 6 N. W. 742; Gregg v. Union Pac. Ry. Co., 48 Mo. App. 494. Any permanent improvements erected by one who occupies land with the consent of the owner are personal property: Doak v. Wiswell, 38 Me. 569. As between partners an engine placed upon land owned by one of them and used in connection with the partnership business is personal property: Greenwood v. Maddox, 27 Ark. 648. In Poughkeepsie Gas Co. v. Citizens' Gas Co., 20 Hun, 214, it was held that gas-pipes laid by a gas company at the request of the owner of property continued to be the personal property of the company and did not become a part of the realty. So, also, as to mains laid in the streets of a city by the consent of the municipal authorities: Memphis Gaslight Co. v. State, 6 Cald. 310, 98 Am. Dec. 452. But in Providence Gas Co. v. Thurber, 2 R. I. 15, 55 Am. Dec. 621, where gas-pipes were laid in the public streets under the authority of a charter granted by the legislature, the court held this was not a mere license, but a grant, and that the gas-pipes were fixtures and taxable as realty.

A license is revocable, and a licensee has the right to remove his buildings or other structures when the license is withdrawn: Gregg v. Union Pac. Ry. Co., 48 Mo. App. 494. A licensee is entitled to a reasonable opportunity to remove his structures upon a revocation of his license: Ingalls v. St. Paul etc. Ry. Co., 39 Minn. 479, 12 Am. St. Rep. 676, 40 N. W. 524. A license cannot be revoked so as to make the licensee a trespasser, and to change the structures erected from personal property to realty: Barnes v. Barnes, 6 Vt. 388.

**4. Trade Fixtures Affixed by Tenant.**—As between landlord and tenant, the rule is well settled that trade fixtures, although securely fastened to the freehold, are the personal property of the tenant, and may be removed by him, if the removal can be af-

fectcd without material injury to the freehold: *Cubbins v. Ayres*, 4 Lea, 329; *Lemar v. Miles*, 4 Watts, 330; *Kile v. Giebner*, 114 Pa. St. 381, 7 Atl. 154; *Perkins v. Swank*, 43 Miss. 349; *Pemberton v. King*, 2 Dev. 376; *Raymond v. White*, 7 Cow. 319; *Yates v. Mullen*, 23 Ind. 562; *Commissioners v. Stubbs*, 25 Kan. 322; *Andrews v. Day Button Co.*, 132 N. Y. 348, 30 N. E. 831; *Tate v. Blackburne*, 48 Miss. 1; *Roth v. Collins*, 109 Iowa, 501, 80 N. W. 543; *Hughes v. Shingle Co.*, 51 S. C. 1, 28 S. E. 2; *Thompson etc. Ry. Co. v. Young*, 90 Md. 278, 44 Atl. 1024.

The general rule at common law, that whatever was annexed to the freehold became a part of it, seems always to have been subject to an exception in favor of tenants who placed fixtures on property to be used in connection with trade or manufactures: *Perkins v. Swank*, 43 Miss. 349. Such right exists even in the absence of a special contract, no such contract being necessary: *Yates v. Mullen*, 23 Ind. 562. The right to remove is implied from the circumstances: *Howard v. Fessenden*, 14 Allen, 124. Indeed, the consent of the landlord is not necessary to give the tenant the right to remove trade fixtures: *Andrews v. Day Button Co.*, 132 N. Y. 348, 30 N. E. 831. Such fixtures remain the personal property of the tenant without the consent of the landlord. It has even been held that where the lease provided that the tenant should not remove "any repairs, improvements, additions, or fixtures," such provision was not intended to apply to trade fixtures: *Cubbins v. Ayres*, 4 Lea, 329. And in *Hey v. Bruner*, 61 Pa. St. 87, where a tenant covenanted that permanent additions should be left on the property at the expiration of the lease, and to belong to the owners of the premises, it was held that machinery placed on the property by him for the benefit of his business was his personal property. A lease which stipulates that erections or additions placed on the premises shall belong to the landlord on the termination of the lease does not include electrical machinery placed in a leased building for the purpose of furnishing power for an electric-light system: *Liebe v. Nicolai*, 30 Or. 364, 48 Pac. 172.

We need not consider minutely what may be deemed trade fixtures. The courts have been liberal in construing fixtures to be for purposes of trade and to belong to the tenant as personal property. Engines, boilers, and other machinery placed on leased property for the use of the tenant in operating his business, and which can be removed without injuring the realty, have been held to be chattels which belong to the tenant: *Hewitt v. Watertown Steam Engine Co.*, 65 Ill. App. 153; *Hayes v. New York Gold Min. Co.*, 2 Colo. 273; *Crane v. Brigham*, 11 N. J. Eq. 29; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Cooper v. Johnson*, 143 Mass. 108, 9 N. E. 33; *Cook v. Champlain Transp. Co.*, 1 Denio, 91; *Reynolds v. Shuler*, 5 Cow. 323; *Updegraff v. Lesem* (Colo. App.), 62 Pac. 342; *Hughes v. Shingle Co.*, 51 S. C. 1, 28 S. E. 2;

Lake Superior etc. Co. v. McCann, 86 Mich. 106, 48 N. W. 692. "Whatever is affixed to the land for the purpose of trade, whether it be made of brick or wood, is removable at the end of the term." said the court in Wiggins Ferry Co. v. Ohio etc. Ry. Co., 142 U. S. 396, 12 Sup. Ct. Rep. 188. "Indeed, it is difficult to conceive that any fixture, however solid, permanent, and closely attached to the realty, placed there for the sole purposes of trade, may not be removed at the end of the term."

Domestic fixtures put up for the more convenient use of the premises are personal property, and may be removed by the tenant: Wall v. Hinds, 4 Gray, 256, 64 Am. Dec. 64; Gaffield v. Hapgood, 17 Pick. 192, 28 Am. Dec. 290; Hays v. Doane, 11 N. J. Eq. 84.

Fixtures erected for purposes of agriculture, or for mixed purposes of trade and agriculture, are the personal property of the tenant, which may be removed by him: Perkins v. Swank, 43 Miss. 349; Pemberton v. King, 2 Dev. 376; Holmes v. Tremper, 20 Johns. 29, 11 Am. Dec. 238; Harkness v. Sears, 26 Ala. 493, 62 Am. Dec. 742; McCracken v. Hall, 7 Ind. 30; Wing v. Gray, 56 Vt. 261.

Furniture and stock fixtures erected and used for purposes of trade are the personal property of the tenant who places them on the realty: Berger v. Hoerner, 36 Ill. App. 360; Shapira v. Barney, 30 Minn. 59, 14 N. W. 270; Stout v. Stoppel, 30 Minn. 56, 14 N. W. 268; Guthrie v. Jones, 108 Mass. 191; Kimball v. Grand Lodge, 131 Mass. 59.

Buildings and other structures, as well as machinery and stock fixtures, if necessary to the trade of the tenant, are trade fixtures, and may be removed by him as personal property: Brown v. Reno etc. Co., 55 Fed. 229; Security etc. Co. v. Willamette etc. Co., 99 Cal. 636, 34 Pac. 321; Macdonough v. Starbird, 105 Cal. 15, 38 Pac. 510; White's Appeal, 10 Pa. St. 252; Western N. C. R. R. v. Deal, 90 N. C. 110; Dubois v. Kelly, 10 Barb. 496. It must be clear, however, that a building is erected as a trade fixture, otherwise it becomes a part of the realty in the absence of an agreement, express or implied, that it is to remain the personal property of the builder: Peirce v. Grice, 92 Va. 763, 24 S. E. 392; Schlemmer v. North, 32 Mo. 206; Gett v. McManus, 47 Cal. 56. Trade fixtures, to be capable of removal by a tenant, must be additions made by the tenant to the property, and not substitutions for worn-out parts: Ashby v. Ashby, 59 N. J. Eq. 536, 46 Atl. 528. If a tenant erects fixtures under a covenant in a lease which obliges him to do so, they are not removable, even though to be used for purposes of trade: Tunis Lumber Co. v. Dennis Lumber Co., 97 Va. 682, 34 S. E. 613. As already noticed, in order to render annexations "trade fixtures," they should be removable without material injury to the realty or to themselves: Conrad v. Saginaw Min. Co., 54 Mich. 249, 52 Am. Rep. 817, 20 N. W. 39; Bartlett v. Haviland, 92 Mich. 552, 52 N. W. 1008. The mere fact that in removing a fixture it is



necessary to take it to pieces will not destroy its personal character if it is a machine that can be, and is intended to be, separated into various parts. But if a thing cannot be severed without being reduced to a mere mass of crude materials, as, for example, a baker's oven, it will remain a fixture, though it had been used solely for purposes of trade: *Collamore v. Gillis*, 149 Mass. 578, 14 Am. St. Rep. 460, 22 N. E. 46. Bowling alleys, however, have been held to be removable as trade fixtures, although they were firmly nailed to the floor of a building, and their removal would cause some injury to the building: *Hanrahan v. O'Reilly*, 102 Mass. 201. A subtenant cannot make an agreement with the land owner that certain trade fixtures shall be realty, without the consent of the tenant of the landlord: *Podlech v. Phelan*, 13 Utah, 333, 44 Pac. 838.

There is usually an implied agreement between the owner of an easement and the owner of land that trade fixtures may be removed, although there may be no technical relation of landlord and tenant between the parties: *Wiggins Ferry Co. v. Ohio etc. Ry. Co.*, 142 U. S. 396, 12 Sup. Ct. Rep. 188; *Evans v. McLucas*, 15 S. C. 67.

It seems to be a matter not fully settled to what extent an agreement is implied between a life tenant and remainderman that the life tenant or his representatives may remove fixtures erected by him. There is a tendency observable in many of the cases to treat a life tenant with the same liberality in this regard as a tenant for years or at will: See *Buckley v. Buckley*, 11 Barb. 43; *Whiting v. Barstow*, 4 Pick. 310. And this is done in the interest of trade. But the relation between the usual life tenant and his remainderman, and that between an ordinary landlord and tenant is not precisely the same. As between the latter parties they are usually strangers, so that the tenant is not presumed to make additions for the benefit of anyone but himself. While between life tenants and remaindermen, there generally exist ties of affection and blood, and the additions and improvements made by the life tenant may be much more readily presumed to be designed not simply for the temporary use of such tenant, but as permanent additions to the property. It would seem, then, that the rule that a tenant for life may remove trade fixtures erected by him, and that there is an implied agreement between him and his remainderman that such fixtures shall remain personalty, is of more limited range than as between an ordinary landlord and tenant. A hard-and-fast rule seems impossible to be laid down as between these parties, but the remainderman certainly occupies a more favorable position than the landlord of a tenant for years: See *Cannon v. Hare*, 1 Tenn. Ch. 22; *Demby v. Parse*, 53 Ark. 526, 14 S. W. 899; *Doak v. Wiswell*, 38 Me. 569; *Overman v. Sasser*, 107 N. C. 432, 12 S. E. 64.

Trade fixtures erected by a purchaser of land, who subsequently fails to complete his purchase, are deemed fixtures which become a part of the realty, and cannot be removed by the defaulting purchaser: *Lapham v. Norton*, 71 Me. 83; *Kingsley v. McFarland*, 82 Me. 231, 17 Am. St. Rep. 473, 19 Atl. 442; *King v. Johnson*, 7 Gray, 239; *Fisk v. People's Nat. Bank*, 14 Colo. App. 21, 59 Pac. 63. The relations of the parties are not such as that the law will imply any agreement that the annexations are to remain personal property: *Kingsley v. McFarland*, 82 Me. 231, 17 Am. St. Rep. 473, 19 Atl. 442. It will be presumed that fixtures were erected with the intention that they should remain a permanent part of the realty: *Lapham v. Norton*, 71 Me. 83. But where the purchaser of land puts machinery thereon, under an agreement that it is to remain the personal property of the seller until paid for, it does not become a part of the realty upon default of the buyer to complete his contract to purchase the land: *Palmateer v. Robinson*, 60 N. J. L. 433, 38 Atl. 957.

#### V. Effect of Agreement as to Third Parties.

a. In General.—While parties themselves may make any agreement they wish as to the personal character of fixtures, yet such an agreement does not in most cases affect the rights of third persons who are not parties to the agreement. To what extent third parties are bound is a question depending upon the nature of the agreement and the relation of the parties. The statement found in some cases that an agreement cannot change the character of the property, so far as third parties are concerned, is true only to a limited extent: See *Kaestner v. Day*, 65 Ill. App. 623. If an agreement is made which recognizes in express terms the chattel character of fixtures, no question can be raised. Thus, where a real estate mortgage is given subject to a chattel mortgage of fixtures, the fixtures retain their chattel character as against such realty mortgagee; *Ellison v. Salem Coal etc. Co.*, 43 Ill. App. 120; *McDonnell v. Burns*, 83 Fed. 866. And if a prior mortgagee recognizes that a fixture is a chattel, it will be treated as personalty as against him in favor of the one who sold the chattel and who retains an interest therein *Bartholomew v. Hamilton*, 105 Mass. 239. When the rights of innocent purchasers or other innocent third parties relying on the apparent character of fixtures as realty are concerned, the fixtures will not retain their personal character: *Arlington Mill etc. Co. v. Yates*, 57 Neb. 286, 77 N. W. 677. If the rights of innocent third parties will not be prejudiced, fixtures may retain their chattel character: *Edwards etc. Lumber Co. v. Rank*, 57 Neb. 323, 73 Am. St. Rep. 514, 77 N. W. 765. If fixtures are personal property as between the realty mortgagor and mortgagee, a subsequent vendee of them as chattels cannot maintain their character as such as against the realty mortgagee: *Harris v. Haynes*, 34 Vt. 220. The mortgagee in such a case has a right to rely on the real

character of the fixtures, and his security cannot be affected by a sale of them as chattels. Such sale is a fraud upon his rights and void as to him: *Hoskin v. Woodward*, 45 Pa. St. 42. Or if the sale is not void, strictly speaking, the purchaser will take the fixture subject to the paramount rights of the realty mortgagee: *Gore v. Jenness*, 19 Me. 53. The fact that fixtures are treated by their owner as personalty in insuring them and in rating them for taxation has no effect as against a mortgagee of the premises: *Watson v. Watson Mfg. Co.*, 30 N. J. Eq. 483.

The question of an agreement retaining the personal character of fixtures affecting third parties more frequently arises in cases where the agreement is made either before the annexation of the chattel to the realty, or before the rights of third parties have accrued. And the problem then is, whether such an agreement is binding on such third parties, or whether they have a right to rely upon the apparent character of the fixture as a part of the realty. We shall take up and consider the various situations in which the question has arisen, and how it has been determined.

**b. Effect as to Prior Mortgagee of Realty.**—As correctly indicated by the principal case, there are two well-defined lines of authorities on this point, one holding that as against a prior mortgagee of the realty the agreement that a fixture shall retain its chattel character is ineffective, the other holding that such an agreement is usually valid and binding on such prior mortgagee. The first rule is sometimes designated the Massachusetts rule, since it has been firmly established in that state from an early time, and the states which have adopted it have followed the Massachusetts authorities. In *Clary v. Owen*, 15 Gray, 522, it was said that if a mortgagor could agree with another that fixtures should remain personalty as against the mortgagee, "it would follow that the mortgagor could convey to another a right in the mortgaged premises greater than he could exercise himself." Hence it was held that "it is not in the power of the mortgagor, by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold, which as between mortgagor and mortgagee would become a part of the realty. The entry of the mortgagee would entitle him to the full enjoyment of the premises, with all the additions and improvements made by the mortgagor or by his authority." To the same effect, see *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Meagher v. Hayes*, 152 Mass. 228, 23 Am. St. Rep. 819, 25 N. E. 105; *Ekstrom v. Hall*, 90 Me. 186, 38 Atl. 106; *Wight v. Gray*, 73 Me. 297; *Evans v. Kister*, 92 Fed. 828; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310; *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21; *Bass Foundry etc. Works v. Gallentine*, 99 Ind. 525; *Hamilton v. Hunkley*, 78 Ind. 521, 41 Am. Rep. 593; *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 39 Am. St. Rep. 166, 35 N. E. 802. But



even in Massachusetts it seems that this rule has been relaxed to a certain extent, and that personal property annexed to and used in connection with realty will not always, as a matter of law, pass under the prior mortgage of the realty. Hence it is held that machines may remain personal property for practically all purposes, even though attached to the freehold, "if the mode of attachment indicates that it is merely to steady them for their more convenient use, and not to make them an adjunct of the building or soil": *Carpenter v. Walker*, 140 Mass. 416, 5 N. E. 160; *Maguire v. Park*, 140 Mass. 21, 1 N. E. 750. And in New York, carpets, curtain poles, and gas fixtures are deemed movables beyond question, and do not inure to the benefit of a prior mortgagee: *Manning v. Ogden*, 70 Hun, 399, 24 N. Y. Supp. 70. In *Williams v. Chicago Exhibition Co.*, 188 Ill. 19, 58 N. E. 611, where the alleged chattel interest in fixtures accrued during the pendency of realty mortgage foreclosure proceedings, it was held that the parties could acquire no greater interest than if they were the mortgagors themselves.

So far as mere numbers are concerned, the jurisdictions are more numerous in which the doctrine prevails that the chattel character of fixtures may be preserved even as against prior realty mortgagees who are not parties to the agreement. It is therefore held that fixtures placed on mortgaged premises by a lessee who intends to retain them as his personal property are personalty as against a prior mortgagee, the law not impressing on such fixtures the character of land: *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655. In this case it was held that improvements placed upon mortgaged land became part of the mortgage security only when the mortgagor himself is entitled to such improvements, but improvements do not inure to the benefit of a mortgagee if the mortgagor himself has no right to them: See, also, *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, 43 Am. St. Rep. 491, 56 N. W. 821. If, however, the fixture is placed on the land after the land has passed to the mortgagee, and during the pendency of foreclosure proceedings, such annexation is made at the peril of the lessee, and passes to the mortgagee unless the premises are redeemed: *Preston v. Briggs*, 16 Vt. 124. This is certainly the rule where the common law doctrine of mortgages prevails.

The rule also applies when personal property is sold to a mortgagor upon condition that it shall remain the property of the vendor until paid for. In such case it does not become a fixture as between the conditional vendor and the prior mortgagee, but retains its chattel character, and the right of the conditional vendor thereto is superior to that of the mortgagee. The reason assigned being "that the mortgagee has parted with nothing on the faith of the annexations being a part of the realty, and therefore has no reason to complain": *Paine v. McDowell*, 71 Vt. 28, 41 Atl. 1042; *German Sav. etc. Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224; *Schumacher v. Allis Co.*, 70 Ill. App. 556. A prior mortgage will not

cover chattels delivered and annexed to realty under a conditional contract of sale, though the realty mortgage in terms states that it is to cover after-acquired property: *General Elec. Co. v. Transit Co.*, 57 N. J. Eq. 460, 42 Atl. 101. See, also, *Wood v. Holly Mfg. Co.*, 100 Ala. 326, 46 Am. St. Rep. 56, 13 South. 948.

As between a chattel mortgagee and a prior realty mortgagee, this line of authorities also holds that fixtures will retain their personal character: *Tibbetts v. Moore*, 23 Cal. 208; *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; *Henkle v. Dillon*, 15 Or. 610, 17 Pac. 148; *Wheeler v. Bodell*, 40 Mich. 693; *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753; *Buzzell v. Cummings*, 61 Vt. 213, 18 Atl. 93; *German Sav. etc. Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224. The chattel mortgage should be made before the annexation, in order to preserve the personal character of the fixture as against the prior realty mortgagee: *First Nat. Bank v. Elmore*, 52 Iowa, 541, 3 N. W. 547; *Miller v. Wilson*, 71 Iowa, 610, 33 N. W. 128; *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125; *Davenport v. Shants*, 43 Vt. 546.

The reason upon which all these cases are decided is, that the annexation not having been made at the time when the mortgagee took his realty mortgage, he has not been misled, or advanced anything on the faith of it, and hence ought not to be permitted to avail himself of it as a part of his security, contrary to the intention of the party making the annexation: See cases already cited. If the security of the prior mortgagee is not affected, the fixture remains personalty as to him. A mortgagor and his tenant cannot by their acts do anything to impair the mortgagee's security: *Broadbudd v. Smith*, 121 Ala. 335, 77 Am. St. Rep. 61, 26 South. 34; *Northwestern etc. Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028; *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279. And the fixtures must be capable of removal without injury to the real estate: *German Sav. etc. Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224; *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237; *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279. This last case contains a good statement for the reason for this rule. "It is difficult," said the court, "to perceive any equitable ground upon which the property of another which the mortgagor annexes to the mortgaged premises should inure to the benefit of a prior mortgagee of the realty. The real estate mortgagee had no assurance at the time he took his mortgage that there would be any accession to the mortgaged property. He may have believed that there would be such an accession, but he obtained no right, by the terms of his mortgage, to a lien upon anything but the property as it was conditioned at the time of its execution. He could not compel the mortgagor to add anything to it. So long, therefore, as he is secured the full amount of the indemnity which he took, he has

no ground for complaint. There is, therefore, no inequity toward the prior real estate mortgagee, and there is equity toward the mortgagee of the chattels, in protecting the lien of the latter to its full extent, so far as it will not diminish the original security of the former. . . . If the detachment of the articles so annexed will occasion no damage to the realty, then the lien upon them can be enforced in the same degree as if they had remained chattels. If the detachment would occasion some diminution in the value of the freehold, as it would have stood had the attachment not been made, then the depreciation must first be made whole to the real estate mortgagee before the right of the chattel mortgagee can be recognized."

A further limitation has been placed on the rule that fixtures may by agreement retain their chattel character as against a prior mortgagee, which is that if the fixture loses its identity as a chattel and becomes a part of the realty, its chattel condition is completely gone. But the authorities are not agreed in the application of the rule. In *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279, it was said that if the articles had been so firmly annexed to the land that their detachment would involve the dismantling of an important feature of the realty, it could be said that the chattel character of the fixtures had been abandoned. In *Porter v. Pittsburg etc. Steel Co.*, 122 U. S. 267, 7 Sup. Ct. Rep. 1206, rails and other articles placed by a railroad upon land were held to become such a permanent part of the realty, and so identified with the land as to inure to the benefit of a prior realty mortgagee, and an agreement that the additions should remain personalty were as to him of no effect. Following this case, the court went even farther in *Phoenix Iron Works Co. v. New York etc. Trust Co.*, 83 Fed. 757, where machinery placed in the powerhouse of a street railroad company was held to become an integral part of the property as a railroad system, and become subject to a prior real estate mortgage. The extent to which these cases extended the doctrine that permanent annexations became a part of the real estate so as to inure to the benefit of a prior mortgagee was severely criticised in *General Elec. Co. v. Transit Co.*, 57 N. J. Eq. 460, 42 Atl. 101, and the court refused to follow them, holding that motors, controllers, and trolley poles are not so mingled with the car to which they are attached as to preclude a seller from maintaining a lien thereon as against prior realty lienholders, these articles being of standard make, and capable of easy removal so as to leave the car ready to receive other equipments of a similar character. The doctrine asserted in the United States cases just referred to would seem, in its practical application, almost to deny the power of parties to preserve the chattel character of fixtures as against a prior realty mortgagee. Such a rule is, of course, in line with the Massachusetts and other cases already noticed.



Naturally in those states where a prior mortgagee is not usually bound by an agreement between others that fixtures shall retain their chattel character, such prior mortgagee should have notice of the agreement and consent thereto before he can be deemed to be bound thereby: See *Bartholomew v. Hamilton*, 105 Mass. 239; *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. 14. In other jurisdictions, however, the question of notice or knowledge on the part of a prior mortgagee would appear to be immaterial: See *Defiance Mach. Works v. Trisler*, 21 Mo. App. 69; *Watertown Steam etc. Co. v. Davis*, 5 Houst. 192.

c. **Subsequent Mortgagee of Realty.**—A subsequent mortgagee of real estate is bound by an agreement that fixtures shall retain their personal character if he has notice of the agreement at the time the mortgage is made: *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 21 Am. St. Rep. 231, 25 N. E. 558; *Wood v. Holly Mfg. Co.*, 100 Ala. 326, 46 Am. St. Rep. 56, 13 South. 948; *Walker v. Schindel*, 58 Md. 360. But by the great weight of authority such an agreement cannot be enforced against a subsequent bona fide mortgagee of the realty who has no notice thereof: *Tibbetts v. Horne*, 65 N. H. 242, 23 Am. St. Rep. 31, 23 Atl. 145; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493; *Wickes Bros. v. Hill*, 115 Mich. 333, 73 N. W. 375; *Brennan v. Whitaker*, 15 Ohio St. 446; *Southbridge Sav. Bank v. Exeter Works*, 127 Mass. 542; *Wade v. Donau Brew. Co.*, 10 Wash. 284, 38 Pac. 1009; *Davenport v. Shants*, 43 Vt. 546. Of course, if an annexed chattel is not a fixture in any event, its personal character is not affected by any subsequent mortgage: *Keeler v. Keeler*, 31 N. J. Eq. 181. The fact that the agreement of sale or other agreement expressly provides that a chattel should not be annexed to the freehold so as to become a fixture has no effect as to a subsequent bona fide realty mortgagee without notice: *Wickes Bros. v. Hill*, 115 Mich. 333, 73 N. W. 375. In *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744, where the realty mortgage was given to secure a pre-existing debt, the fixture was held to retain its chattel character in favor of a conditional vendor thereof.

There are a few jurisdictions in which an agreement retaining the chattel character of fixtures is good as against even a subsequent realty mortgagee without notice: *Adams Mach. Co. v. Interstate Bldg. etc. Assn.*, 119 Ala. 97, 24 South. 857; *Warren v. Liddell*, 110 Ala. 232, 20 South. 89; *Hirsch v. Graves Elev. Co.*, 24 Misc. Rep. 472, 53 N. Y. Supp. 664; *Case v. L'Oeble*, 84 Fed. 582.

As to what will constitute sufficient notice to a subsequent mortgagee that the fixtures are to retain their chattel character, it has been held in Ohio that the mere filing of a chattel mortgage does not constitute such notice: *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493; *Brennan v. Whitaker*, 15 Ohio St. 446. In *Deane v. Hutchinson*, 40 N. J. Eq. 83, 2 Atl. 292, where such a mortgage was recorded only in the record of chattel mortgages it was held

insufficient notice. But it has also been held that where the laws of a state require chattel mortgages to be filed and recorded, such filing and recording constitute sufficient notice to subsequent encumbrancers, and they are bound by the agreement: *Sword v. Low*, 122 Ill. 487, 13 N. E. 826; *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125; *First Nat. Bank v. Adam*, 138 Ill. 483, 28 N. E. 955.

**d. Subsequent Purchaser of Realty.**—The authorities are a unit to the effect that an agreement that a fixture shall be personalty is binding on a subsequent purchaser with notice. As was stated in *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125, "where the owner of real estate executes a mortgage upon chattels, which may properly be made fixtures, and subsequently affixes them to the real estate, no person having knowledge of such facts can, by purchase of the real estate or otherwise, acquire from the mortgagor any title to such chattels paramount to the mortgagee thereof." This, we believe, is the universally recognized rule: See *Wilgus v. Gettings*, 21 Iowa, 177; *Jones v. Cooley*, 106 Iowa, 165, 76 N. W. 652; *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658; *Davis v. Buffum*, 51 Me. 160; *Morris v. French*, 106 Mass. 326; *Warner v. Kenning*, 25 Minn. 173; *Duke v. Shackelford*, 56 Miss. 552; *Priestly v. Johnson*, 67 Mo. 632; *Dubois v. Kelly*, 10 Barb. 496; *Powers v. Dennison*, 30 Vt. 752.

A subsequent purchaser is bound, though he is told by his vendor that the claim of the third person to claim the fixture as a chattel is unfounded: *Morris v. French*, 106 Mass. 326. If a licensee erects a structure upon land after it has been sold by his licensor, the grantee having knowledge of the licensee's rights and remaining silent while the structure is being built, it is personalty and may be removed: *Dubois v. Kelly*, 10 Barb. 496. But a vendee must have notice of the licensee's claim of title. And the mere fact that a licensee occupies a building erected by him upon land is not notice to a subsequent vendee of his license or claim of title: *Powers v. Dennison*, 30 Vt. 752.

By the great weight of authority a subsequent vendee who has no notice of an agreement that fixtures shall retain their chattel character is not bound by such agreement, but takes the property free from any encumbrance: *Bringhoff v. Munzenmaier*, 20 Iowa, 513; *Fletcher v. Kelly*, 88 Iowa, 475, 55 N. W. 474; *Climmer v. Wallace*, 28 Mo. 556, 75 Am. Dec. 135; *Fryatt v. Sullivan Co.*, 5 Hill, 116; *Knowlton v. Johnson*, 37 Mich. 47; *Watson v. Alberts*, 120 Mich. 508, 79 N. W. 1048; *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205; *Ridgeway Stove Co. v. Way*, 141 Mass. 557, 6 N. E. 714; *Powers v. Dennison*, 30 Vt. 752; *Landigan v. Mayer*, 32 Or. 245, 67 Am. St. Rep. 521, 51 Pac. 649; *Ice etc. Co. v. Lone Star Engine etc. Works*, 15 Tex. Civ. App. 694, 41 S. W. 835. This rule holds good whether the agreement which makes the fixtures personalty is a chattel mortgage, conditional sale, license, or of whatever character it may be, as the above cases will indicate.

Under the previous subdivision we had occasion to inquire whether the mere recording of a chattel mortgage was sufficient notice to a subsequent mortgagee. The rule would naturally be the same as applied to a subsequent vendee, and, as indicated, the authorities are somewhat in conflict. The better rule seems to be that the mere recording of a mortgage as a chattel mortgage is not in itself sufficient notice to a subsequent purchaser of the realty. See, in addition to the cases heretofore cited on this point, *Ice etc. Co. v. Lone Star Engine etc. Works*, 15 Tex. Civ. App. 694, 41 S. W. 835; *Tibbetts v. Horne*, 65 N. H. 242, 23 Am. St. Rep. 31, 23 Atl. 145. That the filing of a chattel mortgage constitutes notice, see *Rowland v. West*, 62 Hun, 583, 17 N. Y. Supp. 330.

In a few states the rule prevails that an agreement that chattels used in connection with realty shall retain their personal character is binding even upon subsequent purchasers of the real estate without notice of the agreement: *Hilborne v. Brown*, 12 Me. 162; *Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254; *Fifield v. Maine Cent. R. R. Co.*, 62 Me. 77; *Warren v. Liddell*, 110 Ala. 232, 20 South. 89; *Ford v. Cobb*, 20 N. Y. 344; *Godard v. Gould*, 14 Barb. 662; *Mott v. Palmer*, 1 N. Y. 564; *Kerby v. Clapp*, 15 N. Y. App. Div. 37, 44 N. Y. Supp. 116.

These authorities proceed upon the theory that the chattels affixed are not the property of the land owner, and consequently he has no right to make a sale of them even though the situation of the chattels on the land was such as to give them the appearance of being a part of the realty. A vendee who takes personal property under a conditional sale can do nothing with the property to defeat the vendor's title: *Warren v. Liddell*, 110 Ala. 232, 20 South. 89. This case in support of its decision quoted from *Sumner v. Wood*, 67 Ala. 139, 42 Am. Rep. 104, to the effect that "when there is an express stipulation in the sale of personal property that that property shall not be the vendee's until the price is paid, the title does not pass, the transaction being a mere conditional sale; and that a bona fide purchaser of such property acquires only the conditional title of his vendor, and cannot be protected against recovery on suit brought by the original vendor and owner of the legal title. The fact that the purchaser or second vendor was, at the time of sale, in possession of the property, does not change the principle. It is a question of right and not of notice, and the maxim *caveat emptor* applies with as much force as in cases of ordinary bailments." And in *Godard v. Gould*, 14 Barb. 662, a case which has been repeatedly followed in New York, it was said of machinery sold conditionally to a land owner, that "being personal property, the grantors [of the realty] could not convey any greater interest in it than they had. It is not material whether or not it would have passed by the deed without the special clause embracing fixtures, and as part of the land, but for the agreement that the plaintiffs should remain the owners; it was in either



case personal property, belonging to others, whose title the grantors could not transfer. Nor does the fact that the defendants are bona fide grantees in the conveyance make any difference. The plaintiffs in no way consented to the conveyance; they have not practiced any fraud on the defendants; their equities are at least equal to those of the defendants, and the recording act has no application to the case. I am not aware of any principle upon which it could be held that the plaintiffs have lost their title." Under these cases if a fixture cannot be removed without a substantial destruction of the realty, its chattel character has become so merged in the realty that it will be considered such and pass to a grantee: *Godard v. Gould*, 14 Barb. 662. This would appear to be a case, however, where an agreement would not be binding even as between the parties.

We have cited some Michigan cases to the effect that an agreement preserving the chattel character of fixtures has no effect as against a subsequent purchaser without notice. The supreme court of that state, however, seems not to have announced this doctrine in the broad sense as is found in other states. Indeed, Michigan seems to have followed a somewhat combination rule to this effect, that such an agreement is binding on a subsequent realty purchaser even without notice, where the vendor and owner of the personalty does nothing to indicate an intent on his part to permit the chattel to be so annexed to realty as to change its personal character, and the chattel is easily removable. But where the vendor and owner of the personalty consents to annexation thereof to the realty in such a manner that to all outward appearance it is converted into realty, then the annexation is realty as against a bona fide purchaser of the land without notice of the chattel character of the fixtures: See *Lansing Iron etc. Works v. Walker*, 91 Mich. 409, 30 Am. St. Rep. 488, 51 N. W. 1061; *Lansing Iron etc. Works v. Wilbur*, 111 Mich. 413, 69 N. W. 667; *Knowlton v. Johnson*, 37 Mich. 47. This rule would appear to be a difficult one to apply with any degree of certainty, and for this reason is much less satisfactory than either of the other rules.

**e. Purchaser at Mortgage Foreclosure Sale.**—A purchaser at a foreclosure sale appears to occupy the same position as any other purchaser of the realty. Hence, it seems that in those jurisdictions where a purchaser without notice is protected, and is not bound by any agreement as to the chattel character of fixtures, a purchaser at a mortgage foreclosure sale is entitled to the same favored position: See *Union etc. Life Ins. Co. v. Tillery*, 152 Mo. 421, 75 Am. St. Rep. 480, 54 S. W. 220; *Landigan v. Mayer*, 32 Or. 245, 67 Am. St. Rep. 521, 51 Pac. 649. If the chattel annexations are not fixtures a purchaser at foreclosure sale will acquire no property in them: *St. Louis etc. R. R. Co. v. Nyce*, 61 Kan. 394, 59 Pac. 1040; *Skinner v. Ft. Wayne etc. R. Co.*, 99 Fed. 465.

In those jurisdictions where a purchaser without notice is bound by the agreement preserving the chattel character of fixtures, a purchaser at a mortgage foreclosure sale will likewise be bound by such an agreement: See *Royce v. Latshaw* (Colo. App.), 62 Pac. 627; *Case v. L'Oeble*, 84 Fed. 582; *Sprague Nat. Bank v. Erie R. R. Co.*, 22 N. Y. App. Div. 526, 48 N. Y. Supp. 65.

A purchaser at foreclosure sale is entitled to the same protection against prior claims as the realty mortgagee enjoyed. Hence, although he may have had actual notice of the chattel character of fixtures, yet he is not affected thereby, if the realty mortgagee had no notice thereof and was in no manner affected by an agreement which retained the personal character of fixtures: *Landigan v. Mayer*, 32 Or. 245, 67 Am. St. Rep. 521, 51 Pac. 649.

#### f. Execution Creditors and Purchasers at Execution Sale.—

Where a party retains title to personal property which is affixed to realty, it is his chattel, and is subject to execution as his personal property the same as any other property which he may own. This general rule is well settled: *Doty v. Gorham*, 5 Pick. 487, 16 Am. Dec. 417; *Ombony v. Jones*, 19 N. Y. 234; *Walton v. Wray*, 54 Iowa, 531, 6 N. W. 742; *Lemar v. Miles*, 4 Watts, 330; *Lanphere v. Lowe*, 3 Neb. 131; *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83; *Morey v. Hoyt*, 62 Conn. 542, 26 Atl. 127; *Havens v. West Side etc. Co.*, 44 N. Y. St. Rep. 589, 17 N. Y. Supp. 580; *Broadus v. Smith*, 121 Ala. 335, 77 Am. St. Rep. 61, 26 South. 34. The agreement whereby the chattel character of fixtures is preserved may, therefore, be taken advantage of by a creditor of the chattel owner, and an execution creditor may enter the premises and remove such fixtures: *Lanphere v. Lowe*, 3 Neb. 131. The execution creditor in such a case has the same right to remove the fixture as a chattel as his debtor had. He acquires precisely the same rights as such debtor, but no more: *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83. And the execution creditor, having the same right to remove the fixtures as his debtor, should remove them within the time allowed for the debtor to remove them. So that ordinarily if the execution creditor fails to remove them within the proper time, his right to do so ceases: *Morey v. Hoyt*, 62 Conn. 542, 26 Atl. 127. It is not in every case, however, that a fixture may be levied upon and sold as the personal property of the one who placed it there under an agreement that its personal character should be preserved. Hence it has been held that though a tenant may have a right to remove a fixture, yet if it is so annexed to the freehold that it cannot be removed without injury to the premises, it is realty until severed, and cannot therefore be levied upon, sold and removed by an execution creditor of the tenant: *Pemberton v. King*, 2 Dev. 376. And in *McNally v. Connolly*, 70 Cal. 3, 11 Pac. 320, it was held that an engine, boiler and machinery for a flouring mill, erected by a lessee on leased premises, and securely attached thereto by bolts

and screws, are fixtures, under section 660 of the Civil Code, as between the lessee and his attaching creditors, notwithstanding an agreement between the lessor and lessee that the latter should be at liberty to remove the machinery upon the expiration of the lease. And where a levy is made by a creditor of a tenant without the knowledge of the landlord, and before the sale the tenant releases his right to the fixture to his landlord, the fixture is converted into realty belonging to the landlord, so that no sale can be made: *Thropp's Appeal*, 70 Pa. St. 395. And in *San Francisco Breweries v. Schurtz*, 104 Cal. 420, 38 Pac. 92, it was held that fixtures attached by a lessee were a part of the realty until severed, so that a real estate mortgage given by the lessee of his leasehold estate would cover such fixtures. And that, therefore, one who purchased the fixtures as personalty under execution subsequent to the date of the mortgage acquired no interest that was not subject and subordinate to the mortgage. It must be clear that the chattel character of fixtures has been preserved before they can be levied upon as personalty. Hence where the owner of land with machinery thereon, gave a realty mortgage on the real estate and also a chattel mortgage of the machinery to the same person, this does not per se operate to impress upon such machinery the character of chattels, as between the mortgagee and a general creditor of the mortgagor: *Homestead Land Co. v. Becker*, 96 Wis. 206, 71 N. W. 117. See *New York Security Co. v. Saratoga Gas Co.*, 88 Hun, 569, 34 N. Y. Supp. 890. And where the interest of a land owner has been sold under execution against him, the purchaser acquires title to all fixtures on the land though not actually attached to the freehold, as against a subsequent judgment creditor who levies upon them as personal property: *Voorhis v. Freeman*, 2 Watts & S. 116, 37 Am. Dec. 490.

While there is no doubt about the general right of a creditor to levy upon and sell fixtures as the chattels of the one who has placed them on realty under an agreement that they should remain his personal property, a different question arises when execution is levied upon the interest which the owner of the land has in the realty and the fixtures thereon. The fixtures are personalty as between the land owner and the owner of the personalty, but as against a purchaser under an execution sale of the realty, is he bound by such an agreement? If the purchaser has notice of the personal character of the annexation, no doubt he would be bound by such knowledge and could acquire no rights as against the real owner of the chattels: See *Stillman v. Flenniken*, 58 Iowa, 450, 43 Am. Rep. 120, 10 N. W. 842; *Thomson v. Smith*, 111 Iowa, 718, 82 Am. St. Rep. 541, 83 N. W. 789; *Coleman v. Lewis*, 27 Pa. St. 291. And one who purchases at an execution sale of the realty with knowledge of the chattel character of fixtures will be enjoined from removing them as his own property: *Hershberger v.*



Johnson, 37 Or. 109, 60 Pac. 838. A purchaser at an execution sale seems to occupy the same position as any other vendee of the property: See *Kirwan v. Latour*, 1 Har. & J. 289, 2 Am. Dec. 519; *Farrar v. Chauffetete*, 5 Denio, 527. Hence his rights would be the same as those of any purchaser of the realty. If he has notice of the chattel character of fixtures he is bound by it, and acquires no title to such fixtures as against the real owner. And in those jurisdictions where a vendee without notice acquires good title to the fixtures and is not bound by an agreement preserving their chattel character, a purchaser at an execution sale has the same rights: See *Stillman v. Flenniken*, 58 Iowa, 450, 43 Am. Rep. 120, 10 N. W. 842; *Thomson v. Smith*, 111 Iowa, 718, 82 Am. St. Rep. 541, 83 N. W. 789. While in those jurisdictions where a vendee acquires no greater rights than his vendor had, and in consequence is deemed bound by an agreement with his vendor that fixtures should retain their personal character, a purchaser at an execution sale has no greater rights, succeeds to no title other than the judgment debtor had, and as to him the fixtures are and remain personal property: See *Sisson v. Hibbard*, 75 N. Y. 512; *Kinsey v. Bailey*, 9 Hun, 452; *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *Scudder v. Anderson*, 54 Mich. 122, 19 N. W. 775. Such a purchaser is not deemed entitled to the protection accorded a bona fide purchaser without notice, especially where the personal property is easily removable from the land: *Scudder v. Anderson*, 54 Mich. 122, 19 N. W. 775.

**g. Purchaser or Mortgagee of One Who Annexes the Fixture.**—One who succeeds to the rights of a party who has retained a chattel interest in fixtures usually has the same rights as such party. Subsequent purchasers or mortgagees may be subject to, and have the benefit of, an agreement that fixtures shall retain their chattel character: *Frederick v. Devol*, 15 Ind. 357. Hence where a lessee has a right to remove fixtures erected by him, a purchaser or assignee from him succeeds to the same right: *Keefe v. Furlong*, 96 Wis. 219, 70 N. W. 1110; *McMath v. Levy*, 74 Miss. 450, 21 South. 9, 523. A purchaser from a tenant must, however, remove the fixtures within the time allowed to the tenant, or otherwise preserve his rights by an agreement with the land owner. Hence where a purchaser of a fixture fails to do this, and subsequently occupies the premises under a new lease from the landlord, reserving no right to remove fixtures erected by the former tenant, he has no such right. It is immaterial what unexercised right of removal the former tenant had, since such right was not extended to him by agreement: *Talbot v. Cruger*, 151 N. Y. 117, 45 N. E. 364. See, also, *Sampson v. Camperdown Cotton Mills*, 64 Fed. 939.

The owner of a fixture preserved as a chattel may also give a chattel mortgage thereon: *Lanphere v. Lowe*, 3 Neb. 131. And the

mortgagee will acquire, by foreclosure and sale, the mortgagor's right of removal: *Wintermute v. Light*, 46 Barb. 278. Buildings, however, erected on leased land form a part of the leasehold estate and are proper subject matter of a real estate mortgage. Hence where such a mortgage is given it is good as against the lessor who claims a lien upon such a building as a chattel, under his agreement with the lessee that he should have a first lien upon all goods, chattels and other property belonging to the lessee: *First Nat. Bank v. Adam*, 138 Ill. 483, 28 N. E. 955. And where a lessee gives a mortgage upon a building erected by him the building is considered realty as to the mortgagee, though the lessee has the right to remove it, as against a subsequent purchaser thereof as personal property: See *Knapp v. Jones*, 143 Ill. 375, 32 N. E. 382; *Commercial Bank v. Pritchard*, 126 Cal. 600, 59 Pac. 130.

**h. Lessor of Realty.**—It has already been seen that fixtures placed by a tenant upon leased land are usually considered personalty and may be removed by the tenant. Hence where personal property is annexed to realty by a tenant, the vendor of such property retaining his interest therein by a chattel mortgage, conditional sale, or in some other manner, the property is personal as to all parties concerned, including the lessor: See *Hewitt v. General Elec. Co.*, 164 Ill. 420, 45 N. E. 725; *Hewitt v. Watertown Steam Engine Co.*, 65 Ill. App. 153. This is not a real case of a third party being bound by an agreement between others as to the personal character of a fixture; because the property in each of these cases would have been deemed personal as against the lessor in any event. *Lange v. Fisch*, 9 Misc. Rep. 475, 30 N. Y. Supp. 220, is a much clearer case of a lessor being bound by an agreement between the lessee and another. In this case the lessee purchased personal property to be paid for on delivery. It was not paid for, the lessee being subsequently dispossessed and later died. The court held that no title had passed to the lessee, and that as against the lessor the vendor was entitled to the chattels though they had been attached to the freehold. We have already noticed that a realty mortgage given by a lessee of his leasehold interest including a building erected by him is good as against the lessor who seeks to enforce a lien upon such building as a chattel: *First Nat. Bank v. Adam*, 138 Ill. 483, 28 N. E. 955.

**i. Remaindermen.**—We have previously seen that there is an implied agreement that a life tenant may remove trade fixtures erected by him during his tenancy, but that this rule is more restricted in the case of a life tenant than in the case of an ordinary tenant, for the reason that a life tenant more frequently makes improvements which he intends to be permanent additions to the land. This protection extends to a tenant of a life tenant perhaps even to a greater extent than to the life tenant himself, since there is less likelihood that the subtenant intends to make an-

nexations for the permanent benefit of the freehold. Hence a tenant of a life tenant under an agreement, express or implied, that he may remove fixtures placed on the realty by him, has a right to remove them as against the remaindermen: See *Charleston etc. Ry. Co. v. Hughes*, 105 Ga. 1, 70 Am. St. Rep. 17, 30 S. E. 972; *Chicago etc. R. R. Co. v. Goodwin*, 11 Ill. 273, 53 Am. Rep. 622. But in *Demby v. Parse*, 53 Ark. 526, 14 S. W. 899, where a subtenant erected a dwelling-house on land under an agreement with the life tenant that he might subsequently remove it, it was held that there was no right of removal as against the remainderman, since he was not bound by the agreement made with the life tenant. It appears from this case, therefore, that no agreement to remove fixtures would affect the remainderman's right to hold them as realty, unless they were trade fixtures, and that a dwelling-house cannot be a trade fixture. In *Haflick v. Stober*, 11 Ohio St. 482, it was said that a subtenant has no right to remove fixtures as against the remainderman unless the tenant has a legal right to remove them, without reference to any contract, and refused to extend the rule to include barns and other structures erected for farming purposes.

A grantee or vendee or lessee of a life tenant has substantially the same rights as the life tenant, and may remove fixtures placed on the land by him if the life tenant had such right: *Buckley v. Buckley*, 11 Barb. 43. But no additional rights, it seems, can be reserved to him by special agreement which may be enforced against the remainderman after the termination of the life estate: See the case cited above.

**j. Lienholders.**—Where land is sold under a contract that the vendor should retain a lien thereon, or upon an agreement that if the purchaser failed to perform his contract and complete the purchase, all machinery and tools put upon the land should become the property of the vendor, such lien will not prevail as against the right of the seller of such machinery, who makes a conditional sale thereof to the grantee of the realty. The agreement preserving the chattel character of the fixtures is binding upon the grantor of the land as against his vendor's lien: *Hendy v. Dinkerhoff*, 57 Cal. 3, 40 Am. Rep. 107; *Burrill v. Wilcox Lumber Co.*, 65 Mich. 571, 32 N. W. 824. A chattel mortgage upon fixtures afterward attached to realty is a superior lien to the vendor's lien upon the realty for the purchase money: *Miller v. Wilson*, 71 Iowa, 610, 33 N. W. 128; *Willis v. Munger Mach. Co.*, 13 Tex. Civ. App. 677, 36 S. W. 1010.

The chattel mortgage should, however, be given prior to the annexation to the realty, for, if not given until afterward, it has already become a part of the realty and subject to the lien of the vendor of the realty: *Perkins v. Swank*, 43 Miss. 349. It is intimated in some of the cases that the vendor should have notice



that the fixture retains its personal character, or it will be subject to his lien as against the chattel mortgagee or conditional seller of the fixture: *Brannon v. Vaughan*, 66 Ark. 87, 48 S. W. 909. But the better rule seems to be that the fixture is personalty and the chattel lien thereon is superior to the realty vendor's lien, whether such vendor had knowledge of the annexation of the chattel or not: *Willis v. Munger Mach. Co.*, 13 Tex. Civ. App. 677, 36 S. W. 1010. If the fixture consists of a room built as an addition to a building, so that it could not be removed without great injury thereto, the room is not personalty as against the lien of the vendor of the realty: *Brannon v. Vaughan*, 66 Ark. 87, 48 S. W. 909.

A mechanic's lien will attach to a building erected by a lessee as being an interest in land, notwithstanding an agreement between the lessor and lessee that the building might be removable by the lessee as personal property. The mere private agreement of the lessor and lessee will not affect the mechanic's lien holder: *Dobschuetz v. Holliday*, 82 Ill. 371; *West Coast Lumber Co. v. Apfield*, 86 Cal. 335, 24 Pac. 993. A contrary rule seems to be announced in *White's Appeal*, 10 Pa. St. 252, where a building erected by a lessee under a right of removal was held not to be subject to a mechanic's lien. If a chattel mortgage is given upon fixtures, or their personal character is otherwise preserved, a subsequent mechanic's lien upon the building of which the fixtures form a part, or upon a building which by reason of a chattel mortgage is considered personalty, will not affect the chattel character of the fixture, especially if the mechanic's lien holder had knowledge of the agreement preserving the personal character of the fixtures: *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125; *Fletcher v. Kelly*, 88 Iowa, 475, 55 N. W. 474. Under this last case it seems that notice to the mechanic's lien holder is not necessary to bind him by the agreement that the fixture is a chattel, since his lien attaches subject to all outstanding equities, whether he had notice of them or not, unless this rule is modified by statute.

In Massachusetts, it appears that one who has a lien upon land as security for damages occupies the same position as a prior mortgagee of the realty, as respects an agreement that fixtures shall remain personalty, and hence such person is not bound by the agreement unless he is a party thereto or otherwise gives his consent to it: *Hunt v. Bay State Iron Co.*, 97 Mass. 279.

**WINCHELL v. WAUKESHA.**

[110 Wis. 101, 85 N. W. 668.]

**NUISANCE.**—A MUNICIPAL CORPORATION is no more exempt from liability in case it creates a nuisance, either public or private, than an individual.

**MUNICIPAL CORPORATIONS—POLLUTING WATERS.**—Legislative authority to install a sewer system carries no implication of authority to create or maintain a nuisance, whether it results from negligence or from the plan adopted.

**MUNICIPAL CORPORATIONS—SPECIAL DAMAGE FOR NUISANCE.**—Where a defendant city creates and maintains a nuisance which causes special and private damage to a plaintiff, he is entitled to the same remedies as if the defendant were a private individual.

**EVIDENCE—TRIAL WITHOUT JURY.**—In an action tried without a jury, the admission of improper evidence alone is not ground for reversal.

**INJUNCTION AGAINST DISCHARGING SEWAGE BY MUNICIPAL CORPORATIONS.**—In a suit to enjoin a city from maintaining a nuisance by discharging sewage into a stream, it is material whether such action would destroy the sewer system and subject the citizen to serious inconvenience. Hence evidence is admissible tending to show that the sewer system might be equipped with apparatus which would deodorize and render innocuous the outflow.

**EQUITY PLEADING—COMPLAINT.**—In a suit to obtain equitable relief, a complaint is sufficient which shows irreparable injury which is continuously and constantly recurring, and that any remedy obtainable in a court of law would be inadequate.

**JURISDICTION—AMOUNT IN DISPUTE.**—Where an action is brought to enjoin a nuisance which affects property valued at ten thousand dollars, the damages claimed are but six thousand, and the nuisance can be abated for five thousand, the amount in controversy is less than twenty-five thousand dollars, so as to confer jurisdiction on the court.

**JUDGMENT—ENJOINING NUISANCE—MEANING OF "SEWAGE."**—Where a judgment restrains a city from discharging sewage through its sewer system after a certain date, the term "sewage" is intended to mean refuse matter in such condition and manner as to create a nuisance.

Suit to enjoin the maintenance of a sewer system by the defendant city as a nuisance, and to recover damages. Plaintiff was the owner of the land before the sewer was established. The sewer system emptied into the Fox river which was the only natural drainage course of the city. This stream ran on one side of plaintiff's place. Offensive and disagreeable odors arose from the stream by reason of the sewage, and the water was unfit for bathing or watering stock. The flow of the stream

was about double the amount of sewage emptied into it, with a tendency for the amount of sewage to increase.

H. J. Frame, city attorney, Ryan & Merton, and E. Merton, for the appellant.

Armin & Waite and C. E. Armin, for the respondent.

<sup>105</sup> DODGE, J. The findings and evidence disclose a very obvious nuisance, which, if created and maintained by an individual, <sup>106</sup> would entitle the plaintiff to the aid of a court of equity to effect its abatement, and to damages if pecuniary injury be established, within the decisions of this court which are cited and summarized in *Middlestadt v. Waupaca etc. Co.*, 93 Wis. 1, 4, 66 N. W. 713. Two entirely well recognized elements of special and private injury are established namely, substantial defilement of the waters of a stream flowing along and over plaintiff's land so as to prevent the beneficial use of the water, and so as to injure and impair the use of the land itself; also for the creation of noisome and noxious odors interfering with the comfort, convenience, and probably the health of plaintiff and her family in the occupation of her habitation. These injuries to the plaintiff in the use of her property and to the property itself are none the less special and private because by the same acts may be created and maintained a public nuisance in defiling the waters of a navigable stream, or in polluting the atmosphere to the detriment of the public health. It has been declared by this court in *Harper v. Milwaukee*, 30 Wis. 365, 372, that "the general rule of law is that a municipal corporation has no more right to erect and maintain a nuisance than a private individual possesses, and an action may be maintained against such corporation for injuries occasioned by a nuisance for which it is responsible in any case in which, under like circumstances, an action could be maintained against an individual." Again, in *Hughes v. Fon du Lac*, 73 Wis. 380, 41 N. W. 407, it is said: "A municipal corporation is no more exempt from liability in case it creates a nuisance, either public or private, than an individual." These statements are very broad, and, appellant insists, must yield to various exceptions and limitations. Certain decisions elsewhere are urged upon our attention, notably, *Pennsylvania etc. Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, 6 Atl. 453, and *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062. The logic of the line of decisions illustrated by the latter case may be <sup>107</sup> summarized as follows: The collection and disposal of sewage is for the



public safety. Cities therein are performing a governmental function for the general public, not a merely corporate power. The use of streams for such public purpose is within the right of the state government. No constitutional obstacle exists unless private property is actually taken. Impairment of use of running water or of the atmosphere is mere indirect and consequential damage, and does not amount to a taking of any property. The general authority to municipalities to construct sewer systems is a direct legislative authority to use the natural drainage courses, since in no other manner can the outflow be dismissed. Hence, no liability being expressly imposed, none results from the use of the watercourses for such purpose, in absence of negligence. Some of the propositions in this chain of reasoning have received apparent approval in our own decisions. It has been said that garbage and sewage disposal is the performance of a governmental function for the general public: *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030; also that more limited rules of liability apply in the exercise of such function than of more distinctively municipal or corporate powers: *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030; *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420; that mere consequential injury is not a taking of property within the constitutional prohibition: *Alexander v. Milwaukee*, 16 Wis. 247; *Colclough v. Milwaukee*, 92 Wis. 182, 186, 65 N. W. 1039; that the state for certain public purposes has absolute dominance over navigable streams, without liability to riparian owners: *Cohn v. Wausau Broom Co.*, 47 Wis. 314, 2 N. W. 546. Some of these questions, as we view the case before us, are not essential to its decision, and are of such vast importance, and the effect of a decision so far-reaching, that it ought not to be made until squarely presented and fully argued. We cannot but recognize that, as the density of our population increases, as our citizens engage in new and greater industries, and as the municipal aggregations of population multiply <sup>108</sup> and expand, the original purity of the streams and water basins cannot be wholly preserved. They are the natural and unavoidable courses and receptacles of drainage, through and into which must flow the refuse of human habitation and industry. How far these changing conditions must bring about a yielding of the private rights of continued purity of those lakes and streams to the necessity of use thereof for the public and general health and convenience, and upon what terms such yielding shall come, are primarily questions of policy for the legislature, within the

limits of its power over private rights defined by the constitution. When, if ever, the legislature shall enact that streams generally or any streams shall be used as sewers without liability to the owners of the soil through which they run, the question of constitutional protection to private rights may be forced upon the courts for decision. Until such enactment is made, however, in clear and unambiguous terms, we shall be slow to hold by inference or implication that it has been made at all. The right of the riparian owner to the natural flow of water substantially unimpaired in volume and purity is one of great value, and which the law nowhere has more persistently recognized and jealously protected than in Wisconsin. Not alone the strictly private right, but important public interests, would be seriously jeopardized by promiscuous pollution of our streams and lakes. Considerations of æsthetic attractiveness, industrial utility, and public health and comfort are involved. Amid this conflict of important rights, we cannot believe that the legislature concealed, in words merely authorizing municipalities to raise and expend money for the construction of sewers, a declaration of policy that each municipality might, in its discretion, without liability to individuals, take practical possession of the nearest stream as a vehicle for the transportation of its sewage in crude and deleterious condition. At that stage in its logic we cannot <sup>109</sup> agree with the Indiana court in *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062. The authority granted to municipalities is to construct sewers, but subject to the general legal restrictions resting upon such corporations forbidding invasion of private rights by creation of nuisance or otherwise. This view of the legislative purpose is enforced by the consideration that, although liquid sewage must flow off along the general drainage courses of the vicinity, it is by no means physically necessary that it should carry with it the solids in an offensive or unhygienic condition: *Hackstack v. Keshena Imp. Co.*, 66 Wis. 439, 29 N. W. 240. It is a matter of common knowledge, and of proof in this case, that there are practicable methods for the decomposition and practical destruction of such solids before delivering them into open watercourses; the most modern method, as explained in the evidence here, being treatment in septic bacteria tanks, whereby the decomposition and resolution into inoffensive and innocuous fluids, gases, and mineral solids is greatly expedited. This method, it appears, could be installed at Waukesha at a cost approximating five thousand dol-

lars. It is not probable that the legislature has wittingly authorized the defilement, and almost destruction, of our streams, to enable such trifling measure of economy to municipalities. The great weight of authority, American and English, supports the view that legislative authority to install a sewer system carries no implication of authority to create or maintain a nuisance, and that it matters not whether such nuisance results from negligence or from the plan adopted. If such nuisance be created, the same remedies may be invoked as if the perpetrator were an individual. The following are selected from an almost unlimited array of decisions: *Jacksonville v. Lambert*, 62 Ill. 519; *Jacksonville v. Doan*, 145 Ill. 23, 29, 33 N. E. 878; *O'Brien v. St. Paul*, 18 Minn. 176; *Clark v. Peckham*, 9 R. I. 455; *Good v. Altoona*, 162 Pa. St. 493, 42 Am. St. Rep. 840, 29 Atl. 741; *Owens v. Lancaster*, 182 Pa. St. 257, 37 Atl. 858; *Haskell v. New Bedford*, 108 Mass. 208; *Morse v. Worcester*, <sup>110</sup> 139 Mass. 389, 2 N. E. 694; *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499; *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154; *Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. Rep. 366, 18 N. E. 88; *Missouri v. Illinois*, 180 U. S. 208, 21 Sup. Ct. Rep. 331; *Carmichael v. Texarkana*, 94 Fed. 561.

From what has already been said our conclusion is obvious that the creation and maintenance of a nuisance by the defendant city, causing special and private damage to the plaintiff, fully appears from the finding and evidence, and that plaintiff is entitled to the same remedies as if the defendant were a private individual. One of the forms of relief authorized by section 3180 of the Statutes of 1898, is accorded by the judgment appealed from, and, subject to modification to be hereafter suggested, was entirely proper under the circumstances.

Defendant assigns error upon the admission of certain evidence tending to show that its sewer system might practicably be equipped with septic tanks, or other apparatus to deodorize and render innocuous the outflow, construing this as tending to charge negligence upon the city. The rule is, of course, familiar that in an action tried without a jury the admission of improper evidence alone would not work reversal, but we do not deem this evidence improper. While there was no issue of negligence either in construction or management of the sewer, the prayer for an injunction was addressed to a court of equity, and the effect of such remedy upon the defendant was an important consideration in guiding the court to a de-



cision whether it ought to apply the drastic process of injunction, or ought to leave the plaintiff to her other remedies. It was extremely material to that consideration to ascertain whether such injunction would utterly destroy the entire sewer system of Waukesha, and subject its citizens to serious inconvenience, and peril of disease. The fact that the system as now existing could still be used by adding appliances involving no very great expense justifies relief by injunction, and in that respect the evidence was admissible.

<sup>111</sup> It is contended that the complaint warrants no relief in equity, because it fails to allege in *hæc verba* any of the several conditions of equitable relief prescribed by section 3180 of the Statutes of 1898. The complaint does, **however**, allege facts showing fully irreparable injury, and that the same is continuously and constantly recurring and that any remedy obtainable in a court of law would be inadequate. This must suffice without stating either of these conclusions from the specific facts so alleged.

An objection is raised to the jurisdiction of the county court of Waukesha county for that such court is limited to cases in which "the value or amount in controversy or the amount claimed or sought to be recovered after deducting all payments and setoffs shall not exceed twenty-five thousand dollars." We find nothing in this record to support the view that such limit is transcended. The plaintiff's property, which the action is brought to protect, is of value only about ten thousand dollars. The damages claimed are but six thousand dollars. If, as appellant contends, we consider the effect upon defendant, we find uncontradicted evidence that the nuisance complained of can be abated by appliances costing only about five thousand dollars. Thus, on any theory of the value or amount in controversy, it is less than twenty-five thousand dollars, and we need not consider the several constructions possible to the statute.

While the unlimited form of injunction embodied in the judgment is not discussed as an independent ground of error, yet it is before us upon this appeal, and we do not feel justified in approving the judgment without such qualification as will make obvious the meaning which we are persuaded the trial court intended to express. The judgment restrains defendant "from discharging its sewage through its sewer system into the Fox river at any time after December 1, 1901." Similar language received consideration in *Morgan v. Danbury*,

67 Conn. 484, 35 Atl. 499, and was sustained on the ground that the word "sewage" would be understood to refer only <sup>112</sup> to "the refuse and foul matter, solid or liquid," carried through the sewer by the water therein flowing. In that case, as here, it was contended that some disinfecting apparatus would effectively purify the water. In the case at bar the findings make apparent the views of the trial court that some such addition to defendant's present system could be made practically effective to prevent the damage of which plaintiff complained, and that he had such appliance in mind in his finding "that until December 1, 1901, as a reasonable time to allow said defendant city to change its sewage system, and provide for the doing away with the nuisance to plaintiff." The same idea evidently persisted in the conclusion of law and order for judgment, for it is there declared that defendant "should be restrained from continuing such nuisance, and from further emptying or depositing its sewage into said Fox river in such condition and manner as to create the nuisance to the plaintiff." We have no doubt the judgment was intended to express the same thing, and only upon that construction do we approve of it. To the end, however, that any ambiguity may be removed, we deem it best to modify the judgment as below.

By the Court. The judgment of the county court is modified by adding to the second paragraph the following words, to wit: "Unless the same shall have first been so deodorized, and purified as not to contain foul, offensive, or noxious matter capable of injuring the plaintiff or her property or causing nuisance thereto," and, as so modified, the same is affirmed.

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## HAVE MUNICIPAL CORPORATIONS ANY GREATER RIGHT THAN INDIVIDUALS TO POLLUTE WATERS?\*

### I. Reasonable Use of Stream.

#### a. In General.

#### b. By Cities.

##### 1. Generally.

##### 2. Public Convenience.

### II. Nuisance.

#### a. Generally.

#### b. Effect of Statutory Authority.

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#### \*REFERENCES TO MONOGRAPHIC NOTES.

Liability of a city for creating or maintaining a nuisance: 15 Am. St. Rep. 845-849.  
Liability of municipal corporations for defects in and want of repair of sewers: 29 Am. St. Rep. 737-744.

c. Tide Waters.

d. Prescriptive Right.

III. Injuries Due to Negligence.

IV. Taking Property Without Compensation.

I. Reasonable Use of Stream.

a. In General.—Every riparian owner has the general right to have a stream flowing by or through his land flow in its natural purity. This general rule, however, does not mean that a riparian owner has a right to a stream absolutely pure, without any pollution whatever. Riparian owners are entitled to the reasonable use and enjoyment of streams flowing by their land, and it is incident to such enjoyment that the purity of the water should be impaired to some extent. It is impossible to use a stream for domestic, manufacturing, commercial, or other purposes without injuring its original purity. The law recognizes the right to such reasonable use and the result which of necessity flows therefrom, and provides that the right of one riparian owner to the use of a stream in its purity must yield to the right of every other riparian owner to make a reasonable use of the same stream. And if in connection with such reasonable use the water is rendered more or less impure, no action will lie for its impurity: *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Tennessee Coal etc. Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 South. 167; *Cary v. Daniels*, 8 Met. 466, 41 Am. Dec. 532; *Townsend v. Bell*, 42 App. Div. 409, 59 N. Y. Supp. 203; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142.

The question, then, whether a stream may be polluted by a municipality or an individual, and to what extent it may be polluted, depends generally on the question whether such use is or is not a reasonable use under the circumstances. What is a reasonable use of a stream by one person at one place might be unreasonable by a different person at a different place. This question of reasonableness is usually one of fact to be determined in each case according to the circumstances. Though, where the facts are undisputed, whether the necessary inferences therefrom establish an unreasonable use is a question of law: *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142. It has been said that in determining this question the extent of the benefit to the one polluting the stream, the inconvenience or injury to others, the size and character of the stream, the uses to which it is put by lower riparian owners, and other circumstances, may be taken into consideration: *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105. "In determining what is a reasonable use," said the court in *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167, "regard must be had to the subject matter of the use; the occasion and manner of its application; the object,



extent, necessity and duration of the use; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party, and the extent of the injury to the other party; the state of improvements of the country in regard to mills and machinery, and the use of water as a propelling power; the general and established usages of the country in similar cases, and all the other and varying circumstances of each particular case, bearing upon the question of the fitness and propriety of the use of the water under consideration": See, also, *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Hazeltine v. Case*, 46 Wis. 391, 32 Am. Rep. 715, 1 N. W. 66.

It is this reasonable use of a stream by a riparian owner which determines whether the rights of lower riparian owners have been unlawfully invaded or not. And many of the apparently irreconcilable decisions will be found to be in perfect harmony if this test is borne in mind. Thus in *Greene v. Nunnemacher*, 36 Wis. 50, where the waters of a stream were rendered impure by a cattle stable and hog yard so that the water could not be used by a lower riparian owner for domestic purposes, it was held that there might be such special damage as to entitle the lower owner to maintain a private action, as for a nuisance, against such upper proprietor. On the other hand, in the same state, in an action for fouling a stream by means of a hog yard, and depriving a lower riparian owner of the use of the water for domestic purposes, an instruction to the jury was held to be correct which stated that if the stream in its natural state was more useful to all the owners for stock purposes than for ordinary domestic uses, the upper owner had a right reasonably to use it, in spite of the injury complained of: *Hazeltine v. Case*, 46 Wis. 391, 32 Am. Rep. 715, 1 N. W. 66. That the pollution of a stream by a hogpen is usually considered an unreasonable use of it, see *Mayor v. Warren Mfg. Co.*, 59 Md. 96; *Smiths v. McConathy*, 11 Mo. 517.

Again, it is generally held an unreasonable use of a stream to so pollute it with refuse from mines that it is rendered unfit for domestic use. And it is no defense that the pollution is the natural and necessary result of mining operations prosecuted in the ordinary way: *Beach v. Sterling Iron etc. Co.*, 54 N. J. Eq. 65, 33 Atl. 286. And in *Tennessee Coal etc. Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 South. 167, the washing of ore which destroyed the domestic utility of water was held to be an unreasonable use, although the ore was valueless without washing, and the creek used was the only available water supply for that purpose. On the other hand, in Pennsylvania, the necessities of the case and the mining interests of the community were such that the rule was so extended as to hold that the operation of a coal mine in the ordinary and usual manner by pumping water out of it into a stream

was a reasonable use of the stream, notwithstanding the quality of its water was so affected as to render it totally unfit for domestic purposes by lower riparian owners. This great extension of the right of an upper riparian owner to reasonably pollute the waters of a stream was deemed necessary in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal: *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, 6 Atl. 453. But this rule will not include pollution which is unnecessary and unreasonable: *Elder v. Lykens Valley Coal Co.*, 157 Pa. St. 490, 37 Am. St. Rep. 742, 27 Atl. 545. The public necessity which requires the adoption of such a rule as the Pennsylvania case sanctions seldom exists so far as private interests are concerned, and in New York it was doubted whether such a relaxation of the rules of law for the protection of private interests would ever be warranted: *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142. In this case a salt manufacturing company was so using a stream as to destroy it for domestic purposes, and the court held the use unreasonable. So of any manufacturing plant which so pollutes the waters of a stream that it is unfit for the domestic use of lower riparian owners, when such plant can be conducted as well elsewhere without injuring anyone: *Weston Paper Co. v. Pope*, 155 Ind. 394, 57 N. E. 719. But in *Barnard v. Shirley*, 151 Ind. 160, 47 N. E. 671, where the owner of a sanitarium allowed water from an artesian well which had been used in the sanitarium for bathing to flow into a stream, this was held to be a reasonable use of the stream, though the water was somewhat polluted thereby.

#### b. By Cities

1. **Generally.**—Cities as riparian owners are entitled to the same reasonable use of a stream as any other owner, and if such reasonable use results in a pollution of the stream, no liability attaches therefor. And it is usually a question of fact what is a reasonable use, but if the facts are undisputed, whether the necessary inferences therefrom establish an unreasonable use is a question of law: *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142. This case, in speaking of what is a reasonable use, said that all surrounding circumstances must be considered, including the "indispensable public necessity of cities and villages for drainage," "so that a use which, under certain circumstances, is held reasonable, under different circumstances would be held unreasonable." The right to deposit a thing in any place is dependent not only on the nature of the thing deposited, but also on the nature of the place in question, and the uses to which that has already been put: *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499.

The amount of impurity which finds its way into a stream from a city is naturally much greater than that caused by a single family

living on a stream. This is a necessary incident to the collection of large numbers of people in one locality. Hence, what would amount to a reasonable use for a city might be a very unreasonable use in the case of an individual. It is, therefore, held that so far as the pollution of a stream by surface water flowing therein from the streets and gutters of a city is concerned, there is, generally, no remedy, because this results from a reasonable use of the stream. The court, in *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540, while recognizing this general right, said: "But this right is not, we conceive, an absolute right under all circumstances, irrespective of the size of the stream, or the natural purpose which it subserves, to throw into it surface water by means of ditches or drains, when, by so doing, it will be filled beyond its natural capacity, and overflow and flood the lands of a lower proprietor." This, however, is an injury other than mere pollution. The right to have a stream flow by one's place in its natural purity is limited by the reasonable use which upper riparian owners may make of it. In discussing this right to reasonably use a stream, the court, in *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592, said: "The natural right of the plaintiff to have the water descend to him in its pure state, fit to be used for the various purposes to which he may have occasion to apply it, must yield to the equal right in those who happen to be above him. Their use of the stream for mill purposes, for irrigation, watering cattle, and the manifold purposes for which they may lawfully use it, will tend to render the water more or less impure. Cultivating and fertilizing the lands bordering on the stream, and in which are its sources, their occupation by farmhouses and other erections, will unavoidably cause impurities to be carried into the stream. As the lands are subdivided and their occupation and use become multifarious, these causes will be rendered more operative, and their effects more perceptible. The water may thus be rendered unfit for many uses for which it had before been suitable; but so far as that condition results only from reasonable use of the stream in accordance with the common right, the lower riparian proprietor has no remedy. When the population becomes dense, and towns or villages gather along its banks, the stream naturally and necessarily suffers still greater deterioration. Roads and streets crossing it, or running by its side, with their gutters and sluices discharging into it their surface water collected from over large spaces, and carrying with it in suspension the loose and light material that is thus swept off, are abundant sources of impurity, against which the law affords no redress by action." No doubt, so far as mere surface water is concerned, a city may use a stream to carry it away, and such use is generally a reasonable one: See, also, *Bainard v. Newton*, 154 Mass. 255, 27 N. E. 995; *Wheeler v. Worcester*, 10 Allen, 591; *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062.



Cities, then, are subject to the same rule as individuals, in the exercise of their right to use a stream so as to pollute it. They are entitled to make a reasonable use thereof, and if, as incident to such use, the stream is to some extent polluted and rendered unfit for ordinary uses by lower riparian owners, no complaint can be made. And a reasonable use by a city, of necessity, permits of greater pollution than does a reasonable use by one individual. But, on the other hand, a city cannot make an unreasonable use of a stream any more than an individual can: *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592. And if there is unreasonable use which results in pollution, the city may be held liable for a resulting injury. The authorities are quite harmonious upon this general rule, that a city may only make a reasonable use of the waters of a stream, but it is in the application of this rule that the main and apparent conflict arises. The great majority of cases, while recognizing that the pollution of a stream by discharging surface water therein constitutes a reasonable use, are loath to extend the doctrine to cases of polluting fresh water streams by the discharge of sewage from a city sewer system: See the principal case. In *Attorney General v. Paterson*, 58 N. J. Eq. 1, 42 Atl. 749, it was held that the pollution of a river by the discharge of city sewage gathered from a large area by means of an artificially constructed system, could not be justified as a natural and reasonable use of the river, a sewage system being vastly more than the mere natural drainage of riparian owners, and the same rule was announced in *Platt Brothers v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154.

Indiana seems to be the only state in which the courts have come out flatfooted on the proposition that a city located on the banks of a stream may discharge its sewage therein, to the defilement of the water, and that such use of the stream is reasonable, when it is necessary as the only practicable means of dispatching the sewage: *Weston Paper Co. v. Pope*, 155 Ind. 394, 57 N. E. 719; *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610; *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 335, 54 N. E. 1062. In this last case the rule applying to pollution by surface water was extended to include sewage, the court saying: "If cities are permitted to adulterate streams by allowing all accumulating surface impurities to flow into them by natural channels, we do not perceive why the underlying principle will not allow them to deepen these natural storm channels and transform them into covered sewers, nor why the right to protect the health and welfare of the public against one class of noxious matter should not be extended to all classes of equal virulence." Such a rule has, we believe, not been adopted elsewhere. Even in Pennsylvania, where the pollution of a stream by mining is held a reasonable use of a stream by an individual,

this doctrine is not extended to cities who collect sewage by an artificial system and discharge it into a stream, since the impurities in the latter case arise from artificial and not from natural causes: *Good v. Altoona City*, 162 Pa. St. 493, 42 Am. St. Rep. 840, 29 Atl. 741. In Illinois the supreme court refused to extend the rule permitting the drainage of surface water into streams to include the discharge of accumulated sewage: *Robb v. La Grange*, 158 Ill. 21, 42 N. E. 77. So, also, did Virginia in *Trevett v. Prison Assn.*, 98 Va. 332, 81 Am. St. Rep. 727, 36 S. E. 373, where pollution of a stream caused by the natural surface drainage incident to a city was said to be very different from that caused by an artificial sewer system which emptied refuse water, urine, and night soil into the stream. The doctrine of these cases seems to be approved in *Marcus Sayre Co. v. Newark*, 60 N. J. Eq. 361, 83 Am. St. Rep. 629, 45 Atl. 985, where the use of private waters or small streams by a city, and the appropriation of them for public sewage, is not a reasonable use of such a stream by the city as a riparian owner. And in *Platt Brothers v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154, the court said: "The use of a stream for drainage may, under some circumstances be reasonable, although the water is thereby rendered unfit for its primary use; but the concentration of filth accumulated by one proprietor, whether an individual or a municipal corporation, and its discharge into the river in such quantities that it is necessarily carried to the premises of another, where it produces a nuisance dangerous to his health and destructive of the value of his property, must be unreasonable." Such a use is unreasonable, though a statute authorizes the use of the stream for sewage purposes: See *Washburn etc. Mfg. Co. v. Worcester*, 153 Mass. 494, 27 N. E. 664, and cases already cited.

2. **Public Convenience.**—No doubt the interest of private persons must yield to public necessity to some extent. And this principle evidently was a controlling one in *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062, and the other Indiana cases which adopt the same rule, and led them to hold that the discharge of sewage into a stream is a natural and reasonable use thereof under the circumstances. As illustrating the public necessity, the court said: "To forbid a discharge of sewage into Salt creek is to deny to the city the right to discharge it anywhere, and thus leave it without the ordinary means of sanitation. . . . The sewage must be dispatched or the city abandoned. The place adopted for the outpour is that adopted by nature, and cannot be had elsewhere. The facts present a case wherein the principle of the greatest good to the greatest number must be permitted to operate, and private interest yield to the public good": See, to the same effect, *Barnard v. Sherley*, 135 Ind. 547, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117; *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610. While pub-

lic convenience may be a legitimate element in determining what is a reasonable use of a stream, the better rule undoubtedly is that public convenience is no excuse for so defiling a stream by sewage as to create a nuisance and destroy private property. No public necessity, however great, can justify the taking of property without compensation in a case of this kind: *Platt Brothers v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154. Such a rule was applied in *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907, where it was held that though sewers are necessary to a city and follow the natural drainage of the country, yet a city is not justified in so emptying its sewage into a stream as to injure private property, without first paying for the damage. "But subject to this qualification, private interest must yield to the public good. If it is a public necessity that the plaintiff's land be taken or damaged in order to dispose of the sewage of the defendant city, it may be so condemned according to law, but the city must first pay him the just compensation." That public necessity will not justify such an injury to private property without compensation, see, further, *Attorney General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. 146. The United States supreme court in *Missouri v. Illinois etc.* Dist., 180 U. S. 208, 21 Sup. Ct. Rep. 331, quoted with approval from *Goldsmid v. Tunbridge Wells etc. Commrs.*, L. R. 1 Eq. 161, on this point: "It has been suggested to me in argument as a matter that ought to be regarded that private interests must give way to public interests; that the court ought to regard what the advantage to the public is, and that some little sacrifice ought to be made by private individuals. I do not assent to that view of the law on the subject. . . . But my firm conviction is that in this, as in all the great dispensations and operations of nature, the interests of the individuals are not only compatible with, but identical with, the interests of the public; and although in this case I have only to consider an injury to the private individual the plaintiff in the present action, yet I believe that the injury to the public may be extremely great by polluting a stream which flows for a considerable distance, the water of which cattle are in the habit of drinking, the exhalations from which persons who reside on the banks must necessarily inhale, and this at a time when the attention of the people and the court is necessarily called to the fact that the most scientific men who have examined the subject are unable to say whether great diseases among cattle and contagious diseases affecting human beings, such as cholera or typhus, and the like, may not in a great measure be communicated or aggravated by the absorption of particles of feculent matter into the system, which are either inappreciable or scarcely appreciable by the most minute chemical analysis. It is impossible in that state of things to say what amount of injury may be done by polluting even partially a stream which flows a considerable distance." In view of such facts as appear from this



quotation it may be considered a question of much difficulty as to what is the greatest public convenience.

There is this difference between the pollution of a stream by an individual and by a city: the first is purely a private use, the latter an appropriation of the stream for a public purpose. The first is always unjustifiable; the second may be justifiable as a public necessity, but cannot be done any more than in the case of an individual unless compensation is made. This difference was pointed out in *Platt Brothers v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154: "The appropriation of the river to carry such substances to the property of another is an invasion of his right of property. When done for a private purpose, it is an unjustifiable wrong. When done for a public purpose, it may become justifiable but only upon payment of compensation for the property thus taken. Public necessity may justify the taking, but cannot justify the taking without compensation. It may be necessary for a city to thus mix with its drainage such substances, but it is not necessary to pour such mixture into the river, without purification; indeed, the purification is coming to be recognized as a necessity. But however great the necessity may be, it can have no effect on the right to compensation for property taken."

## II. Nuisance.

**a. Generally.**—If the pollution of a stream by a city amounts to a nuisance, the city is subject to the same liability as an individual would be. A city has no more authority to create a nuisance than has a private person. But whether an actionable nuisance is created depends on the facts of each particular case. In *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470, the court recognized the right of a city to construct sewers and to discharge sewage into streams, but said: "This right is subject to some limitations. It does not include the right to create a nuisance, public or private. If the sewers or drains are so built or managed as to create a public nuisance, the defendants are indictable; if a private nuisance is created, they are answerable in damages to the person injured." The authorities are quite harmonious on the general proposition that a city cannot create an actionable nuisance by discharging its sewage into a stream. But the application of this rule to varied circumstances causes a considerable conflict of authority. That a city cannot create a public or private nuisance any more than a private person can, see *Peterson v. Santa Rosa*, 119 Cal. 387, 51 Pac. 557; *Bolton v. New Rochelle*, 84 Hun, 281, 32 N. Y. Supp. 442, *Selfert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; *Trevett v. Prison Assn.*, 98 Va. 332, 81 Am. St. Rep. 727, 36 S. E. 373.

In the first case cited above, a perpetual injunction was granted prohibiting the city from discharging sewage into a stream so as to impair its value for ordinary purposes of life, and to render it

unfit for domestic purposes. The authority to discharge sewage into a stream does not sanction such use as results in a nuisance. So, where such use pollutes the air and water to the damage of a private riparian owner, the city is liable: *Moody v. Saratoga Springs*, 17 App. Div. 207, 45 N. Y. Supp. 365. Where a sewer is discharged into a stream in such quantities that it obstructs its flow and throws accumulations of filth out of its banks upon the land of adjoining owners in such a way as to cause damage to the property and offense to the public, there can be little doubt that the city is maintaining a nuisance which will render it liable for resulting damage: See *Blizzard v. Danville Borough*, 175 Pa. St. 479, 34 Atl. 846; *Bolton v. New Rochelle*, 84 Hun, 281, 32 N. Y. Supp. 442; *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907; *Schrivver v. Johnstown*, 71 Hun, 232, 24 N. Y. Supp. 1083; *Owens v. Lancaster City*, 193 Pa. St. 436, 44 Atl. 559; *Lind v. San Luis Obispo*, 109 Cal. 340, 42 Pac. 437; *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499; *Platt Brothers v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154. The case is more difficult where no actual damage to the land has been occasioned, and the pollution of the water itself is the main cause of complaint. In some cases, damages for the mere pollution of the water have not been allowed: *Schrivver v. Johnstown*, 71 Hun, 232, 24 N. Y. Supp. 1083. But if the pollution of the water renders it unfit for domestic purposes to which the lower riparian owners have been accustomed to devote the water, there would seem to be no reason for holding that no nuisance was created, or for denying the liability of the city, and it has been held that where the stream used by the city was fed by springs of pure water which the plaintiff collected into an artificial basin for domestic use and raising fish, and in the winter procured from it a supply of ice, the acts of the city constituted a nuisance for which relief would be given: *Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. Rep. 366, 18 N. E. 88. And where the stream fed two springs of water on the plaintiff's land which were polluted by the sewage discharged into the stream by the city and rendered unfit for use, he was held entitled to recover damages from the city: *Good v. Altoona City*, 162 Pa. St. 493, 42 Am. St. Rep. 840, 29 Atl. 741. The pollution of a stream by discharging sewage therein, so that it is rendered unwholesome and unfit for use, creates a private nuisance on the land of the riparian owner over which it flows: *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218. In this case the discharge of the sewage of a town of sixteen hundred inhabitants into a small creek was said to create a nuisance per se. To the same effect, see *Robb v. La Grange*, 158 Ill. 21, 42 N. E. 77. The better rule seems to be that the fouling of the waters of a stream so that it is rendered unfit for domestic use constitutes such a nuisance that the law will grant relief: See, further, *Peterson v. Santa Rosa*, 119 Cal. 387, 51 Pac. 557; *Mason v. Mattoon*, 95 Ill. App. 525;

*Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499. The principal case clearly recognizes the rights of the individual riparian owner to have the stream flow by him substantially unimpaired in purity, and that it is a nuisance for a city to discharge sewage into a stream so as to destroy its use for domestic purposes. And in *Trevett v. Prison Assn.*, 98 Va. 332, 81 Am. St. Rep. 727, 36 S. E. 373, the court said, quoting from *Wood on Nuisances*: "The pollution of the water by artificial drainage which causes sewage to flow into a stream, spring, or well, whether done by a municipal corporation or an individual, constitutes a nuisance which entitles the owner to damages therefor, the rule being that a municipal corporation has no more right to injure the waters of a stream or the premises of an individual than a natural person." While a city has a right to construct a sewer for the purpose of carrying off its sewage, if the substances discharged create a nuisance to the private injury of an individual, the city cannot escape liability: *Jacksonville v. Doan*, 145 Ill. 23, 33 N. E. 878; *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741.

If the discharge of sewage creates a public nuisance, it may be enjoined and abated the same as any other public nuisance: *People v. San Luis Obispo*, 116 Cal. 617, 48 Pac. 723. And a private person who suffers special damage may have relief: *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703. In this case it was said that there could be no question that to render the waters of a stream so impure that it could not be used for domestic purposes, or for watering cattle, and so that it gave off noxious and unhealthy odors, would be a public nuisance.

It is intimated in some of the cases that a city is not liable for the creation of a private nuisance by polluting a stream, unless it is the result of negligence: See *Owens v. Lancaster City*, 193 Pa. St. 436, 44 Atl. 559; *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062. But as may be noticed elsewhere in this note, negligence in the construction and maintenance of a sewer so as to pollute a stream to the injury of a private person is of itself a separate and distinct ground for liability. And the rule undoubtedly is that a city, whether it is negligent or not in constructing and maintaining its sewer system, is liable to one who is injured by reason of the pollution of a stream into which the city's sewage is discharged: *Bloomington v. Costello*, 65 Ill. App. 407. In *Jacksonville v. Lambert*, 62 Ill. 519, it was said not to be in the slightest degree either a defense or excuse for a city to show that its sewer was constructed of the best material, and the work performed in the most skillful manner, and the plan on the most approved model: See, also, *Simmons v. Paterson*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 45 Atl. 995. The mere construction of a sewer which increases the flow of a stream to the injury of land is *prima facie* wrongful and a nuisance: *O'Brien v. St. Paul*, 18 Minn. 176.



It is no defense to a city that others have helped to pollute the stream and cause the injury to the lower riparian owner: *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167; *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499; *Jacksonville v. Doan*, 145 Ill. 23, 33 N. E. 878. The same rule exists in cases of pollution by a private person: *Weston Paper Co. v. Pope*, 155 Ind. 394, 57 N. E. 719; *Beach v. Sterling Iron etc. Co.*, 54 N. J. Eq. 65, 33 Atl. 286. This rule has been so extended and applied that even if a city disinfects, sterilizes, and purifies its sewage before discharging it into a stream, yet if after such discharge it is brought into contact with other substances in such a way as to work a nuisance, the city may still be held liable therefor: *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499.

Even in Indiana, where the courts have gone to the greatest length in upholding the right of a city to pollute a stream with sewage as being a reasonable use thereof, yet if a nuisance is actually created, a city will be held liable therefor: See *Peck v. Michigan City*, 149 Ind. 670, 49 N. E. 800. In *Valparaiso v. Moffitt*, 12 Ind. App. 250, 39 N. E. 909, where certain acts and conduct were, by statute, declared to be a nuisance, a municipal corporation was held to be liable for erecting and maintaining a nuisance the same as a natural person. Though, as illustrated by *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062, the courts will go much further with cities than with individuals in holding that no nuisance is created, and this by reason of the public necessity cities are under to discharge their sewage into streams and protect the health of the community.

There must be clear and satisfactory evidence that a nuisance is created, where the nuisance has not been judicially established, before an injunction will be granted to restrain a city from discharging its sewage into a stream: *Robb v. La Grange*, 158 Ill. 21, 42 N. E. 77. In another respect, also, cities seem to be subject to more liberal treatment with respect to enjoining nuisances of this character than do natural persons, and this is, that a city will not usually be enjoined from continuing to discharge sewage into a stream so as to cause a nuisance until it has had a reasonable time to provide other means to dispose thereof: *Attorney General v. Paterson*, 58 N. J. Eq. 1, 42 Atl. 749; *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499.

The apprehended fouling or pollution of a stream in the future by the sewage of a city, from sewers which have been legally, scientifically, and properly constructed, but which has not taken place, and of which there is no immediate or imminent danger, it being doubtful whether any nuisance will arise, since this depends upon a contingency which may never happen, does not furnish a case for an injunction: *Hutchinson v. Delano*, 46 Kan. 345, 26 Pac. 740; *Newark Aqueduct Board v. Passaic*, 46 N. J. Eq. 552, 20 Atl. 54, 22

**Atl. 55.** But it seems that where the necessary result is the creation of a public nuisance, an injunction will be granted: See *Missouri v. Illinois etc.*, Dist., 180 U. S. 208, 21 Sup. Ct. Rep. 331. An injunction is an extreme and severe remedy, and would not be granted in a doubtful case where the apprehended injury might never arise. But where there is actual pollution, a person is not bound to remain quiet until the stream has become such a nuisance that it is obvious to everybody near its banks: *Goldsmid v. Tunbridge Wells etc. Commrs.*, L. R. 1 Eq. 161, quoted from in *Missouri v. Illinois etc.*, Dist., 180 U. S. 245, 21 Sup. Ct. Rep. 331.

**b. Effect of Statutory Authority.**—It is frequently urged as a defense to an action for polluting waters so that it amounts to a nuisance that the use of a stream for sewage purposes is authorized by statute, and hence no liability can attach. No doubt the doing of any act authorized by statute is not per se a nuisance: *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062. It is frequently said that in the absence of legal right so to do, a municipal corporation, which causes sewage to pollute a watercourse, to the use of which a lower owner is entitled, is guilty of a nuisance for which damages may be recovered: See *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703, and cases there cited. In view of such expressions it is pertinent to inquire what legislative authority is sufficient to relieve a city from the consequences of creating a nuisance. An act authorizing the use of a stream for sewer purposes does not sanction such use as will result in a nuisance: *Moody v. Saratoga Springs*, 17 App. Div. 207, 45 N. Y. Supp. 365. An authority over sewage is not an authority to commit a nuisance: *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218. Undoubtedly, the legislature may authorize acts done which, in the absence of such authority, might amount to nuisances, and individuals may be protected by such statutory authority as well as municipalities. But the protection accorded by statute is confined solely to those consequences which are the necessary and usual result of the act authorized. The creation of a nuisance is not the necessary and usual result of the construction of a sewer system and discharging its contents into a stream. Hence a general statutory authority to build sewers and to discharge them into a stream will not justify the pollution of a stream so as to create a nuisance to the private injury of another: *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664; *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703; *Edmondson v. Moberly*, 98 Mo. 523, 11 S. W. 990; *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694; *Washburn etc. Co. v. Worcester*, 116 Mass. 458; *Franklin Wharf v. Portland*, 67 Me. 46, 24 Am. Rep. 1; *Joplin Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406; *Attorney General v. Paterson*, 58 N. J. Eq. 1, 42 Atl. 749; *Smith v. Atlanta*, 75 Ga. 110. Legislative license to create a nuisance must be given in express terms or by necessary implication: *Attorney General v. Paterson*, 58 N. J.

Eq. 1, 42 Atl. 749. As was said in *Attorney General v. Leeds Corporation*, L. R. 5 Ch. App. 583: "When any person finds that the legislature has authorized a work to be done, he is not to assume it will create a nuisance. On the contrary, the presumption would be that the board would not do anything unlawful. It is lawful for them to make the sewers, it is lawful for them to conduct the sewage into the river, but they are to do it in such a way as not to create a nuisance."

As will be seen later, the legislature has no power to authorize a taking of property for public use without making just compensation therefor. Hence, if the use of a stream for sewage is such that the damage occasioned by the pollution amounts to a taking of private property, the statute is no defense: See *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907; *Attorney General v. Paterson*, 58 N. J. Eq. 1, 42 Atl. 749.

The Indiana cases seem to form an exception to the authorities already considered, and hold that if sewers are constructed under legislative authority upon the best known plan for drainage and discharged into a natural watercourse, it is not a nuisance, unless there is want of due care in its construction or operation, and the legislative grant protects the city from liability by reason of the pollution of the stream. The apparently extreme view taken in these cases, and which we have noticed under other headings, does not have the weight of authority to support it, and we believe is not the better rule: See *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610; *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062. *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464, would seem to sanction a similar rule, and hold that statutory power to construct sewers relieves a city from liability for a nuisance unless it was due to negligence.

No doubt if the public necessity is such that the entire appropriation of a stream for sewage purposes is essential, the legislature may authorize a stream to be appropriated for this use, but compensation must first be made before this can be done: *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907.

In *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552, the distinction was drawn between mere incidental damage resulting from an act done under legislative authority, and direct injury in the nature of a trespass, such as throwing sewage upon the property of another. Statutory authority constitutes no defense to an actual invasion of another's property rights: *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520.

c. *Tide Waters*.—The title to a tidal stream below ordinary high-water mark is in the state as absolute owner. A riparian owner has no title to the land under such waters by reason of his adjacency thereto. The state is the absolute owner of the bed of the stream, and may grant rights therein as it sees fit, subject to the right of



the public to use the stream for purposes of navigation. For this reason tide waters are subject to a different rule from ordinary streams, and statutory authority to discharge sewage into a tidal stream is a sufficient defense to a suit for an injunction on account of the pollution of the stream, and ordinarily the city is not liable to a charge of maintaining a public nuisance: *Simmons v. Paterson*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 45 Atl. 995; *Marcus Sayre Co. v. Newark*, 60 N. J. Eq. 361, 83 Am. St. Rep. 629, 45 Atl. 985. The fact that the sewage pollutes the water and air in the vicinity and thus lessens the value of private property, furnishes no ground for an injunction, or other relief. This incidental damage is a loss for which there is no remedy: *Marcus Sayre Co. v. Newark*, 60 N. J. Eq. 361, 83 Am. St. Rep. 629, 45 Atl. 985. *Attwood v. Bangor*, 83 Me. 583, 22 Atl. 466, intimates a contrary doctrine, but not so clearly that the decisions necessary conflict. The distinction between the rights of riparian owners above the ebb and flow of the tide and those located on tidal streams was clearly brought out in *Simmons v. Paterson*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 45 Atl. 995.

It must not be thought from this, however, that a city is entirely free from all liability by reason of polluting a tidal stream. If a city is negligent in its construction and operation of sewers, and private property is injured, liability will attach though the sewer flows into tidal waters: *Attwood v. Bangor*, 83 Me. 583, 22 Atl. 466; *Clark v. Peckham*, 9 R. I. 455; *Butchers' Ice etc. Co. v. Philadelphia*, 156 Pa. St. 54, 27 Atl. 376. Private property cannot be invaded in tidal waters any more than elsewhere. And statute cannot authorize a direct invasion without making compensation therefor. Hence where oyster beds are maintained in tide waters, a city which ruins them by casting its sewage thereon may be held liable for the resulting loss: *Huffmire v. Brooklyn*, 22 App. Div. 406, 48 N. Y. Supp. 132. Any actual casting of sewage on private property so as to cause special damage is ground for liability: *Bolton v. New Rochelle*, 84 Hun, 281, 32 N. Y. Supp. 442. And where sewage discharged into tide water collected in quantities at a dock so as to obstruct lawful access to the plaintiff's wharf, there is such an injury to private property as to render the city liable: *Butchers' Ice etc. Co. v. Philadelphia*, 156 Pa. St. 54, 27 Atl. 376; *Clark v. Peckham*, 9 R. I. 455. In order to recover damages, however, the party must be able to prove that he has suffered special damage: *Attwood v. Bangor*, 83 Me. 582, 22 Atl. 466. A city cannot discharge sewage into a tidal stream so as to obstruct navigation and thus constitute a public nuisance: *Clark v. Peckham*, 9 R. I. 455. And we believe that the unreasonable use of its sewers so as to actually create a private nuisance cannot be justified on the ground that the nuisance is in tidal waters: See *Clark v. Peckham*, 9 R. I. 455; *Haskell v. New Bedford*, 108 Mass. 208; *Bolton v. New Rochelle*, 84 Hun, 281, 32 N. Y. Supp. 442. But the mere

pollution of a tidal stream by city sewage will not usually amount either to a private or public nuisance: See *Simmons v. Paterson*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 45 Atl. 995.

d. **Prescriptive Right.**—Both a municipality and an individual may gain a prescriptive right to pollute a stream. But mere permissive use cannot create such a right. The user must be adverse in its character: *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907. Mere oral consent to pollute a stream may be revoked at any time. And the fact that the city has expended money in constructing a sewage system on the faith of the parol license furnishes no obstacle to such revocation: *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218. The prescriptive right, if gained, extends only to the use as it was at the beginning of the period; it gives no right to an increased amount of pollution. The user relied on must be of the same character during the entire period the city claims to have exercised it, and it must be exercised to as great an extent during such period, and substantially in as offensive a degree: *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907. See *Bloomington v. Costello*, 65 Ill. App. 407; *Platt Brothers v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154.

A city cannot, however, acquire a prescriptive right to maintain a public nuisance: *Bloomington v. Costello*, 65 Ill. App. 407; *Lewis v. Stein*, 16 Ala. 214, 50 Am. Dec. 177; *Platt Brothers v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154; *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 708.

### III. Injuries Due to Negligence.

City officers in laying out sewers, that is, in determining what drains should be built and where they should discharge, act in a quasi judicial capacity, and for any incidental disadvantage or loss suffered the city is not liable. Of this rule there is no doubt: See *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680. But in constructing such sewers, the city must see that it is done in a proper manner, with a reasonable degree of skill and care. And if there is negligence in their construction or operation or repair, the city may be liable for any resulting damage. The authorities on this point are in harmony. Hence, if the pollution of a stream is caused by negligence, a municipality is liable the same as an individual for the damages which flow therefrom: *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Emery v. Lowell*, 104 Mass. 13; *Peck v. Michigan City*, 149 Ind. 670, 49 N. E. 800; *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694; *Owens v. Lancaster City*, 193 Pa. St. 436, 44 Atl. 559; *Kranz v. Baltimore*, 64 Md. 491, 2 Atl. 908; *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062; *Marcus Sayre Co. v. Newark*, 60 N. J. Eq. 361, 83 Am. St. Rep. 629, 45 Atl. 985; *Attwood v. Bangor*,

83 Me. 582, 22 Atl. 466; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464; *Weet v. Brockport*, cited in 16 N. Y. 161; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540. These cases support the rule that a city is liable for the creation of a nuisance by discharging sewage into a stream where the nuisance is due to negligence. But, as we have intimated elsewhere, negligence and nuisance are distinct grounds of liability, and a city may be liable for the creation of a nuisance whether its sewer system was carefully constructed and operated or not. In *Simmons v. Paterson*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 45 Atl. 995, the court criticised *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592, and *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062, and refused to follow them in so far as they held that a riparian owner has no right of action for the pollution of a stream by city sewage unless it results from improper construction, unreasonable use, or negligence of the city in the care of its sewers.

#### IV. Taking Property Without Compensation.

The legislature cannot authorize the taking of property for a public use without first making compensation therefor. This right of the individual is guaranteed by the constitutions of all the states. Hence if a stream is polluted by the sewage of a city to such an extent as to violate this constitutional right, the fact that the pollution has taken place under a legislative grant of authority furnishes no protection. A municipality has no more right than an individual to take private property without making compensation therefor. While this general constitutional principle is universally recognized, judicial opinion is not harmonious in determining when such right has been invaded.

If the constitution prohibits both the taking and damaging of private property, the protection accorded is very great. And where such a constitutional provision exists, a city cannot lawfully discharge sewage into a stream so as to decrease the value of a riparian owner's land, for such damage is within the constitutional provision, and the owner is entitled to compensation therefor: *Joplin etc. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406; *Butchers' Ice etc. Co. v. Philadelphia*, 156 Pa. St. 54, 27 Atl. 376. And the legislature cannot confer authority upon a city to damage private property in this way without payment of just compensation: *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907. In these states the subject is not one of difficulty.

The conflict of authority occurs in those jurisdictions where the individual is protected merely from the taking of his property, and does not in terms extend to the damage of it. Where a city discharges sewage into a river in such quantities that it is carried to the premises of a lower riparian owner, where it causes a nuisance, and is both dangerous to health and injures the value of his property, this is such a taking of private property as is within



the protection of the constitution, and can be done, even upon the ground of public necessity, only when just compensation is made: *Platt Brothers v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 708; *Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. Rep. 366, 18 N. E. 88; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396.

The great weight of authority undoubtedly sustains this rule, and it has, we believe, the support of the better reasoning. The casting of sewage thrown into a stream upon the property of another constitutes an actual trespass rendering the party occasioning the injury liable for the damages caused: *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321. And as this case observed: "It is a principle of the fundamental law of the state that the property of individuals cannot be taken for public use except upon the condition that just compensation be made therefor, and any statute conferring power upon a municipal body, the exercise of which results in the appropriation, destruction, or physical injury of private property by such body, is inoperative and ineffectual to protect it from liability for the resultant damages, unless some adequate provision is contained in the statute for making compensation. . . . Where the acts done are of such a nature as to constitute a positive invasion of the individual rights guaranteed by the constitution, legislative sanction is ineffectual as a protection to the persons or corporations performing such acts from responsibility for their consequences." The actual casting of sewage from a polluted stream upon the property of another to its damage is certainly a taking of property within the meaning of the constitution, and cannot be done without making compensation. It is a real encroachment upon private property: *Huffmire v. Brooklyn*, 22 App. Div. 406, 48 N. Y. Supp. 132. In this case the court, quoting from *Pumpelly v. Green Bay Co.*, 13 Wall. 166, said that it would be curious if it should be held that "if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of public good, which had no warrant in the laws or practices of our ancestors."

Opposed to the doctrine of these cases is the recent case of *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305, 54 N. E. 1062, where sewage discharged into a river was thrown upon the

private property of an individual, destroying the vegetation and causing noxious odors which were an annoyance and harm to the land owner's family. The court held that this was not such a taking of private property as must be preceded by making just compensation. This case, we believe, is opposed to the entire weight of authority elsewhere.

The question would seem to be a much closer one, where the only injury is to the stream itself, polluting the water so that it was rendered unfit for domestic uses. This is an injury to the water alone and not to land. This consideration has apparently induced the courts in one or two instances to distinguish between an injury to a riparian owner's right to the use of the water and an injury to his land, and denying a right to recover where the sole injury is to his water right by reason of the pollution of the stream. This would appear to be the holding in *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592, and *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610. We do not believe such decisions are sound. To be sure, a riparian proprietor has no property in the water itself: *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610, and cases cited. But he does have a property right in the stream to have it flow past his land practically unchanged in quantity and quality. This right can only be impaired by the lawful use of upper riparian owners: *Simmons v. Paterson*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 45 Atl. 995. These rights are property within the meaning of the constitutional guaranty, and they can be taken for public use only when just compensation has been provided for: *Platt Brothers v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154. In *Peterson v. Santa Rosa*, 119 Cal. 387, 51 Pac. 557, it was held that a riparian owner has a right of property in the waters of a stream, as appurtenant to his land, and any pollution which substantially impairs the value of the water for domestic purposes is an injury to this property right for which an action will lie.

The right of a riparian owner to have the water of a stream flow through his land in an uncontaminated state is a right inseparably annexed to the soil, and to deprive him of this right is the taking of private property, which cannot be done without making compensation: *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 708. The notion that a city can discharge its sewage into a fresh-water stream and pollute it to the injury of a lower riparian owner without liability, we do not believe is the law anywhere outside of Indiana. We doubt whether *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592, establishes such a doctrine for Massachusetts. Public necessity will not justify the pollution of a fresh-water stream by sewage unless compensation is made therefor: *Platt Brothers v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154.

# MINNESOTA STONEWARE CO. v. McCROSSEN.

[110 Wis. 316, 85 N. W. 1019.]

A POWER OF ATTORNEY TO SELL AND CONVEY real estate does not include a power to mortgage.

POWER OF ATTORNEY—INTERPRETATION.—A written instrument, not ambiguous either in its literal sense or in the application of its language to the subject or purpose thereof, must be taken to mean what it says.

EVIDENCE, PAROL.—A POWER OF ATTORNEY TO SELL AND CONVEY REAL ESTATE can no more be extended or changed by parol than can a conveyance of real estate.

HOMESTEAD—ALIENATION.—The homestead right is not exclusively for the benefit of married women, but extends to the whole family, and is inalienable otherwise than in the precise manner indicated in the statute.

HOMESTEAD—MORTGAGE — ESTOPPEL — SIGNATURE OF WIFE.—A mortgage of the homestead of a married man, executed by him, with the wife's signature affixed thereto by her verbal request, for the purpose of obtaining money for her use, together with the full execution of such purpose, does not estop her from denying the validity of the mortgage.

HOMESTEAD—TEMPORARY ABSENCE—VOTING IN ANOTHER STATE.—The temporary removal of a man from his homestead to another state for the benefit of his wife's health, with the intent to return and make the premises his home, does not constitute an abandonment of the homestead, although he may have exercised the elective franchise in the other state while residing there.

Action by judgment creditors to reach real estate claimed by defendant as his homestead. Defendant's wife, for the purpose of empowering her husband to borrow money on the homestead to invest in a business for her, gave him a power of attorney, authorizing him "In my name, place and stead to sell and convey any real estate and personal property which I may now own or may hereafter acquire in the states of Wisconsin and Washington." The husband executed a mortgage under this power of attorney.

Brown, Pradt & Genrich and Neal Brown, for the appellants.

Ryan, Hurley & Jones and M. A. Hurley, for the respondents.

320 MARSHALL, J. The question of the validity of the mortgage involves three questions: 1. Can the homestead of a married man be alienated without the signature of his wife



being affixed to the instrument of conveyance by her own hand with intent to cause such alienation? 2. Does a power to sell and convey real estate include power to mortgage the same? 3. Does a conveyance of the homestead of a married man, executed by him, with the wife's signature affixed thereto by her verbal request, for the purpose of obtaining money for her use, together with a full execution of such purpose, operate by estoppel to alienate such homestead?

As we view the last two propositions the first need not be considered. If the power of attorney to sell and convey did not authorize the act of J. A. McCrossen in signing his wife's name to the mortgage, and the circumstances under which the transaction occurred are not sufficient to render such signing equivalent to the personal signature of Mrs. McCrossen by estoppel, it is immaterial whether such personal signature was necessary or not.

The power of attorney was a mere power to sell and convey, importing authority to sell out and out for cash and not power to mortgage. That is elementary: Jones on Mortgages, sec. 129; Devlin on Deeds, sec. 363a; Morris v. Watson, 15 Minn. 212; Colesbury v. Dart, 61 Ga. 620; Wood v. Goodridge, 6 Cush. 117, 52 Am. Dec. 771; Hoyt v. Jaques, 129 Mass. 286; Perry on Trusts, sec. 768. No departure from such general rule, worthy of consideration, we venture to say, can be found. There is a contrary line of decisions in the state of Pennsylvania, commencing with Lancaster v. Dolan, 1 Rawle, 231, 18 Am. Dec. 625, decided in 1829, and based on an overruled English case. The initial decision, though recognized as wrong tested by the generally accepted doctrine on the subject, was followed <sup>321</sup> in that state until, as we understand by what is said in Zane v. Kennedy, 73 Pa. St. 182, it was deemed too firmly ingrafted upon the judicial system of the state as a rule of property to be dislodged. Nevertheless, in a recent case, Campbell v. Foster etc. Assn., 163 Pa. St. 609, 43 Am. St. Rep. 818, 30 Atl. 222, decided in 1894, it was so evident to the court that the doctrine in Lancaster v. Dolan, 1 Rawle, 236, 18 Am. Dec. 625, as it had been considered, was so out of harmony with the rule prevailing elsewhere, that it was practically overruled by confining it to the precise situation before the court when it was decided—that of a power coupled with an interest. This language was used: "It cannot be questioned but that a mere naked power to sell and convey does not include a power to mortgage."

The Massachusetts court, speaking on the subject in *Hoyt v. Jaques*, 129 Mass. 286, said: "In the ordinary case of a power 'to sell and convey' land, given by a principal to his attorney, it is clear that the attorney would not be authorized to mortgage the land. The two transactions of a sale and a mortgage are essentially different."

The learned counsel for respondents favor us with an interesting and very full discussion of the subject of judicial construction of powers of attorney, covering the whole field thereof, including that of practical construction, but we are unable to see how any rule on the subject has anything to do with this case. No principle is better understood than that a written instrument, not ambiguous either in its literal sense or in the application of its language to the subject or purpose thereof, must be taken to mean what it says, reading it in the sense in which its words would be ordinarily understood, and that where an ambiguity is raised by applying the language of an instrument as before indicated, it cannot be solved by resorting to a meaning not within the reasonable scope of such language. In other words, language cannot be judicially extended beyond its reasonable scope in order to effect the intent of parties, however obvious <sup>322</sup> that intent may appear; for the purpose of all rules for judicial construction is to get sense out of words, not to put sense into them. The rule for practical construction is no exception to that: *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258, 68 N. W. 958. There is no ambiguity in the language of the power of attorney in question. It is the plainest kind of a mere grant of authority to sell and convey real estate, and the court is powerless to make it anything else by any legitimate exercise of judicial power.

The idea is advanced that written authority to an agent may be extended by subsequent oral authority. That is so in many cases, but not where the authority is required by law to be in writing. A power to sell and convey real estate can no more be extended or changed by parol than can a conveyance of real estate. That is so elementary that the suggestion of respondents' counsel to the contrary does not require further notice.

It is claimed that Mrs. McCrossen was bound by estoppel; that she was powerless to accept the benefit of the money obtained by the mortgage given by her consent and then successfully raise the question of want of authority to sign her name to the instrument under the general power of attorney or the verbal request. That point is ruled against respondents by *Cumps v.*

Kiyo, 104 Wis. 656, 80 N. W. 937. It was there held that the protection which the law of this state throws around the homestead right is not exclusively for the benefit of married women—that it extends to the whole family, rendering the homestead inalienable otherwise than in the precise manner indicated in the statute. It was there said that the doctrine declared does not go so far as to prevent a married woman from being bound by estoppel on the specific question of whether a particular piece of property is or is not a homestead, or that a paper signed by her purporting to convey the homestead was so intended, but does prevent the doctrine of equitable estoppel from nullifying the <sup>323</sup> statutory requisites to the alienability of a homestead. The subject there received very careful consideration. The conclusion arrived at is in harmony with the plain intent of the statute, with previous declarations of this court on the subject, and authorities elsewhere. No reason is perceived why the subject should be reconsidered.

There is left the question of fact, upon which the case mainly turned, as to whether the removal of Mr. McCrossen from the homestead was for temporary purposes, with intent not to abandon it as a homestead but to reoccupy it as such, as found by the court. We shall not discuss at length the evidence upon which such finding was made. The trial judge saw the witnesses. He heard the testimony. His opportunity for discovering the truth from what was said and all the circumstances disclosed, as has often been said, was far superior to that possessed here. The presumption is that he reached a correct conclusion, and that presumption is so strong that it cannot yield so easily as to be disturbed by a conclusion here, from reading the evidence, that it preponderates, merely, against the decision. That rule has been very, but not too, often declared. The force of it seems to be so frequently misconceived that reiterations thereof, in language calculated to give it that significance which it really has in our system, seem proper. When it is comprehended that the decision of a trial judge on a question of fact must stand as a verity unless shown to be clearly wrong by a decided preponderance of evidence against it, outweighing the contrary evidence and the presumed advantages which he may legitimately have had in discovering the truth that do not appear in the record, one will take in the full scope of the effect of such decision and appreciate the great power which the trial judge exercises in such matters. It is a power but little less than that exercised by a jury in deciding questions



of fact. The proper exercise of it calls for the most careful scrutiny of the evidence <sup>324</sup> to the end that right may prevail over wrong so far as practicable. The most weighty responsibility incident to the judicial office in trial courts, in civil matters, is that involved in the proper determination of questions of fact upon evidence, because, unlike a wrong decision on a question of law, one on a question of fact may be safe against challenge in an appellate court because of the presumed superiority of opportunity of the former over the latter, which may not, probably does not, in all cases, exist, for separating the right from the wrong.

In this case there is the very significant circumstance that Mr. McCrossen exercised the elective franchise in the state of Washington three times while residing there. We must presume that the essentials of citizenship are the same in that state as here, and that McCrossen's assertion of the right of citizenship, as indicated, was inconsistent with his possessing a homestead in the state of Wisconsin. But we cannot say that such circumstance is conclusive. He violated the law in voting, or he committed perjury in testifying that his residence in the state of Washington was for mere temporary purposes and that his intention at all times was to return to the Wisconsin homestead. The trial court concluded from all the circumstances that he testified to the truth. It seems, looking at the record alone, that there is room for a different conclusion. But there are many cases in the books where it has been held that the mere act of voting at a particular place is not conclusive on the question of residence. Many well-considered cases of that kind are cited to our attention in the brief of counsel for respondents: *Robinson v. Charleston*, 104 Iowa, 296, 73 N. W. 616; *Dennis v. Omaha Nat. Bank*, 19 Neb. 675, 28 N. W. 512; *Mallard v. First Nat. Bank*, 40 Neb. 784, 59 N. W. 511; *Corey v. Schuster*, 44 Neb. 269, 62 N. W. 470; *Campbell v. Potter*, 16 Ky. L. Rep. 535, 29 S. W. 139. In the last case cited the Kentucky court said: "This court has held that the homestead right is never forfeited when there has been an occupancy and then a temporary removal with the intent to return and make the <sup>325</sup> premises a home. Appellants endeavored to show that the appellee abandoned all purpose to return to the property and that his residence had been permanently located elsewhere by proving that he registered and voted in wards in Bowling Green other than the one in which his home was situated. The proof shows that he did this. This act is not conclusive of the question, but

is merely a fact, in connection with the other facts proven, to aid the court in determining whether the removal of the appellee from the premises was permanent or temporary. The court holds that the act of registration and voting are not sufficient to overcome the weight of the testimony which conduces to prove that the removal was temporary."

Courts generally, that have spoken on the subject, reason in the same vein. In this case the circumstance of voting in the foreign jurisdiction was rebutted by the positive evidence of Mr. McCrossen of his purpose in going to the state of Washington and his intention at all times to return, and the circumstance, established by his evidence and that of other witnesses, that the removal to Washington was for the sole purpose of benefiting Mrs. McCrossen's health. In view of all the evidence in the record, and the weight, as above indicated, to be given to the decision of the trial judge, we cannot say that such decision is against the clear preponderance of the evidence. Therefore it cannot be disturbed.

By the Court. The judgment rendered in favor of defendants for costs, establishing the homestead right of J. A. McCrossen, is affirmed. The judgment establishing the validity of the mortgage is reversed. No costs in this court will be allowed in favor of either party to the appeal, except the appellants shall pay the clerk's fees. The cause is remanded with directions to modify the judgment entered so that it will decree the invalidity of the mortgage in accordance with this opinion.

Bardeen, J., took no part.

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**A Power of Attorney to Sell and convey does not include authority to mortgage or otherwise dispose of the property:** *Hawxhurst v. Rathgeb*, 119 Cal. 531, 63 Am. St. Rep. 142, 51 Pac. 846.

**Homestead—Abandonment of.**—A temporary absence from a homestead, with an intention of returning, is not an abandonment: *Lynn v. Sentel*, 183 Ill. 382, 75 Am. St. Rep. 110, 55 N. E. 838. Removing from a homestead and residing elsewhere temporarily for the purpose of business, health or pleasure, does not work an abandonment unless there is an intention not to return: *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607, 58 N. W. 202; *Bunker v. Coons*, 21 Utah, 164, 81 Am. St. Rep. 680, 60 Pac. 549. But see *Conway v. Nichols*, 106 Iowa, 358, 68 Am. St. Rep. 311, 76 N. W. 681. To prove abandonment of a homestead, there must be shown an intention to abandon and an actual abandonment: *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607, 58 N. W. 202. In each case the question is one of fact, resting on its own peculiar circumstances: *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840.

**Homestead.**—On the conveyance and encumbrance of homesteads as affecting the rights of wives therein, see the monographic notes to *Poole v. Gerrard*, 65 Am. Dec. 482-489; *Alt v. Banholzer*, 12 Am. St. Rep. 683-686. A mortgage of a homestead is not valid unless jointly and concurrently executed by both husband and wife: *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910. As to when a wife is estopped to deny the validity of a homestead mortgage, see *Karcher v. Gans*, 13 S. Dak. 383, 79 Am. St. Rep. 893, 83 N. W. 431; *Davis v. Jenkins*, 93 Ky. 353, 40 Am. St. Rep. 197, 20 S. W. 283.

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## CLAUSEN v. HEAD.

[110 Wis. 405, 85 N. W. 1028.]

**CORPORATIONS BY ESTOPPEL.**—Where one deals with an association as a corporation, such dealing, by estoppel, as to such transaction, fixes the status of the company to be what it was represented and recognized to be therein.

**ELECTION—SUIT AGAINST CORPORATION OR INDIVIDUALS.**—Where one, having a right to proceed against an association as a corporation, or against the members thereof as partners, makes an election between the two courses, with knowledge of the facts, he waives the one not chosen.

**RES JUDICATA.**—A JUDGMENT BETWEEN A PERSON AND A CORPORATION is not res judicata in subsequent litigation between such person and the members of the corporation.

**RES JUDICATA—INDEPENDENT ACTIONS AGAINST CORPORATION AND MEMBERS.**—The doctrine that a person may sue a corporation and proceed to final judgment without prejudice to his right to thereafter sue for the same wrong against the members of such corporation applies where there are independent causes of action or remedies against such members and the corporation, that may be pursued regardless of each other.

**ELECTION OF REMEDIES—INTENT TO MAKE A CHOICE.**—The doctrine that intent to make a choice between inconsistent remedies is essential to a choice, and that absence of such intent will relieve one from the effect of the rule, applies only where action in the first instance was taken in ignorance of the facts

Action on a contract to recover of defendants as partners. Defendants had pretended to be a corporation, and made an assignment for the benefit of creditors. Plaintiff presented his claim to the assignee, using this language: "This deponent does not admit that Dan Head & Co. is a corporation and does not waive his right to proceed against them, or either of them, as partners." Plaintiff's claim was adjudged against him, and plaintiff now sues defendants as partners. The question raised was whether the former judgment against plaintiff was res judicata in this case.



Baker & Baker, Wallace Ingalls, and A. L. Sanborn, for the appellant.

Peter Fisher, for the respondents.

**408 MARSHALL, J.** The judgment must be affirmed upon several grounds, either of which is sufficient. If appellant, in the transaction out of which the alleged claim arose, dealt with the association known as Dan Head & Co. as a corporation, such dealing, by estoppel, as to such transaction, fixed the status of the company to be what it was represented and recognized to be therein: *Slocum v. Head*, 105 Wis. 431, 81 N. W. 673. If the dealings with the association, if any such were had, were not with it in the capacity mentioned, since it appears beyond dispute that when the claim was filed with the assignee appellant recognized, for the purposes of the proceeding, the existence of Dan Head & Co. as a corporation and the assignment as that of such corporation, thereby, if the situation were otherwise before, the claim, if in existence against Dan Head & Co. in any capacity, became by estoppel a claim against the company as a corporation and the assignee in his representative capacity as assignee thereof. If appellant, before filing his claim, was not bound by estoppel to recognize Dan Head & Co., as a corporation, as his debtor, if the company was indebted to him at all, he had two remedies to enforce it, which were inconsistent with each other. He could proceed against the association outside of or in the assignment proceedings, as a corporation, or against the members thereof as partners. **409** Having made an election between two courses, with knowledge of the facts, he waived the one not chosen: *Warren v. Landry*, 74 Wis. 144, 42 N. W. 247; *Bank of Lodi v. Washburn etc. Co.*, 98 Wis. 549, 74 N. W. 363; *Carroll v. Fethers*, 102 Wis. 436, 78 N. W. 604; *Barth v. Loeffelholz*, 108 Wis. 562, 84 N. W. 846; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, ante, p. 867, 85 N. W. 698.

The foregoing propositions are so well settled, and the application thereof to this case so clear, that a mere statement of them, with the facts, is deemed sufficient to show that they justify the judgment appealed from and require its affirmance, regardless of whether or not it was rendered upon such grounds.

We fully agree with counsel for appellant that there is no such privity between the members of the corporation and the corporation that a judgment between a person and the latter is *res adjudicata* in subsequent litigation as to the same or any other cause of action between such person and the former (Wells

on *Res Adjudicata*, sec. 179; *Finney v. Guy*, 106 Wis. 256, 82 N. W. 595); and that if the judgment in this case were dependent on the doctrine of *res adjudicata* it could not stand. The principle that a person may sue a corporation and proceed to final judgment without prejudice to his thereafter suing upon the same cause of action or another cause of action involving the same wrong against the members of such corporation, applies where there are independent causes of action or remedies against such members and the corporation, that may be pursued regardless of each other, for independent satisfactions where there are independent wrongs or a single satisfaction, where there is but a single wrong, and the two remedies are not inconsistent. Such was not the situation of appellant when he filed his claim with the assignee of Dan Head & Co. He neither had, nor claimed to have, more than one wrong to be redressed. If his dealings in the transaction out of which his alleged claim arose were with the association as a corporation, <sup>410</sup> he had no remedy at all which involved a denial of corporate existence. At best he had two remedies which were inconsistent, one against the corporation, and one against the members thereof. He was where he could take either of two roads, but not both. The roads reached out in different directions, so that to travel one necessarily required the abandonment of the other, and the choice of one, with knowledge of the facts, destroyed beyond recall the opportunity to take the other. If plaintiff had possessed two entirely independent remedies, not inconsistent with each other, as in *Barth v. Loeffelholz*, 108 Wis. 562, 84 N. W. 846, or had but one remedy for a single wrong and failed in the first instance to pursue it (*Fuller-Warren Co. v. Harter*, 110 Wis. 80, ante, p. 867, 85 N. W. 698; *In re Van Norman*, 41 Minn. 494, 43 N. W. 334; *Gould v. Blodgett*, 61 N. H. 115; *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. 1005), the situation now would be different. Here, taking appellant at the best for him, there were two remedies, each of which required an adjudication of whether the debt involved was that of Lewis. If the indebtedness was not against Lewis, it was indebtedness of Dan Head & Co. as a corporation or as a partnership at the choice of plaintiff, but not the indebtedness of both the corporation and the members thereof. His situation was no better than that of a person who has dealt with another as principal, when such other is in fact the agent for third persons. Such person can pursue either the ostensible or actual principal at his election, but not both: *Mechem on Agency*, sec. 698. The ostensibly

artificial person, Dan Head & Co., by those actively managing the business, was, at appellant's election, either the principal or the agent of those brought into court in this action as defendants. He made his election and the legal consequence was that it precluded him from thereafter taking a different course.

It is suggested that a choice of remedies presupposes intent to make a choice; that without such intent the rule we have discussed does not apply; also, that evidence was erroneously <sup>411</sup> excluded which, if admitted, would have shown an understanding between appellant and respondents, when the claim was filed with the assignee, that such filing and the prosecution of the claim in the assignment proceedings should not prejudice appellant's right to proceed against the members of the corporation as partners, and that the reservation of that right expressed in the claim was placed therein by the procurement of respondents, to induce appellant to believe that his rights as to the members of the corporation would not be jeopardized by proceeding against the assignee; that appellant not only did not intend to make an election of remedies, but that respondents are estopped by their conduct from invoking the former judgment as a bar to the prosecution of this action. The two propositions are so tied together, seemingly, that we have stated and will treat them in that way. The doctrine that intent to make a choice between inconsistent remedies is essential to a choice, and that absence of such intent will relieve one from the effect of the rule we have discussed, applies only where action in the first instance was taken in ignorance of the facts: *Mechem on Agency*, sec. 699; 7 *Ency. of Pl. & Pr.* 366. Where knowledge of the fact exists, intent is conclusively presumed as a matter of law; and such presumption cannot be affected by any declaration or reservation of a right to take a different and inconsistent course at a subsequent time. There is no evidence in the record indicating that appellant acted in ignorance of the facts. All the indications are to the contrary. Nor was any evidence excluded, so far as disclosed by the questions or claimed by counsel, that, had it been admitted, would have shown ignorance. The representations suggested, which the evidence excluded would have shown, admitting that they were made as fully as counsel for appellant claim, referred only to the right to hold the members of the firm or corporation of Dan Head & Co. personally liable for indebtedness due from <sup>412</sup> such company, in any capacity. The idea advanced here is that appellant, in effect, entered upon a contest with the company as a corpora-



tion, as to whether his claim represented indebtedness of such company, with the right reserved by agreement with the members of the company and expressed in his filed claim, in case he failed, to renew the contest in a second action against the members of the company as partners. That is clearly outside of the fair meaning of the reservation in the claim and the oral agreement counsel claims was made.

By the Court. The judgment is affirmed.

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**Election of Remedy.**—If a plaintiff has a choice of remedies, he may elect: *Finch v. Park*, 12 S. Dak. 63, 76 Am. St. Rep. 588, 80 N. W. 155. When he makes his choice between inconsistent remedies, his election becomes conclusive and precludes him from subsequently pursuing the other right or remedy: *Crook v. First Nat. Bank*, 83 Wis. 31, 35 Am. St. Rep. 17, 52 N. W. 1131; *Kearney etc. Co. v. Union Pac. Ry. Co.*, 97 Iowa, 719, 59 Am. St. Rep. 434, 66 N. W. 1059; *Terry v. Munger*, 121 N. Y. 161, 18 Am. St. Rep. 803, 24 N. E. 272; note to *Thomas v. Joslin*, 1 Am. St. Rep. 626. If the election is made in ignorance of his rights, however, he is not concluded: See the monographic note to *Fowler v. Bowery Sav. Bank*, 10 Am. St. Rep. 490.

**Res Judicata.**—A judgment against a corporation is conclusive against the stockholders: *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388; monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 858.

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## RICHARDSON v. TYSON.

[110 Wis. 572, 86 N. W. 250.]

**AN INFANT IS ALWAYS THE WARD OF EVERY COURT** wherein his rights or property are brought in jeopardy, and is entitled to the most jealous care that no injustice be done him.

**GUARDIANS AD LITEM—COMPENSATION, STANDARD OF.**—Guardians ad litem being officers of the court, their compensation is to be measured by the standard of official emoluments, rather than by that of the highest prices demanded and paid between individuals free to contract as they will.

**GUARDIAN AD LITEM—ATTORNEYS—PAYMENT FOR SERVICES ON APPEAL.**—Where an attorney agrees to act as guardian ad litem and conduct litigation for a stated sum at the trial, and on appeal, and after being defeated at the trial, no appeal is taken for two years through the opposition of other counsel, who impugn his motives, and the general guardian refuses him aid and tries to secure his removal, such guardian ad litem is entitled to compensation for his services on appeal, independent of the agreement, the situation being so changed as to render him not bound by it.

**GUARDIAN AD LITEM—EMPLOYING ADDITIONAL COUNSEL.**—A guardian ad litem who employs additional counsel

without an order of court assumes the peril that his action may be disproved, and he be left to bear the expense personally.

**GUARDIAN AD LITEM—EMPLOYING COUNSEL—WHEN JUSTIFIED.**—If, after a guardian ad litem has employed special counsel, it appears that such precaution was reasonably necessary for the welfare of the minors, and such as the court would have authorized in advance had application been made, the reasonable expense thus incurred will be allowed.

**GUARDIAN AD LITEM—FEES ON HEARING OF ACCOUNT—ATTORNEYS' FEES.**—A guardian ad litem who acts fairly, makes full disclosure, and does not make unreasonable demands for credit or allowance, may, in the discretion of the court, be allowed reasonable compensation at the hearing on his account, including necessary attorneys' fees.

**GUARDIAN AD LITEM—EMPLOYING ATTORNEY AT HEARING ON ACCOUNT.**—A guardian ad litem may employ an attorney to represent him at the hearing on his account only under extraordinary circumstances, and it is a question for the court whether the extraordinary circumstances exist which render such employment necessary.

**GUARDIAN AD LITEM.—SERVICES PERFORMED BY AN ATTORNEY** of a guardian ad litem which the guardian himself should have performed are not entitled to an allowance as for a distinctive disbursement therefor; but their character and amount may be taken into consideration as bearing upon the amount of proper allowance to the guardian.

**GUARDIAN AD LITEM—COMPENSATION—OPINIONS OF OTHER ATTORNEYS.**—In determining the proper amount of compensation due an attorney who has acted as a guardian ad litem, the opinions of other attorneys are advisory only, and, although unanimous, are not controlling on the court.

Appeal by a general guardian from an order of court awarding compensation to the plaintiff as guardian ad litem.

Rollin B. Mallory, guardian ad litem, and T. W. Spence, for the appellants.

Charles E. Monroe, for the respondent.

**577 DODGE, J.** Many of the underlying principles upon which rest the rights of the claimant here, as also the limitations of those rights, are clearly decided, not only as the law of the state, but as the irrevocably adjudicated law of this <sup>578</sup> case, in *Tyson v. Tyson*, 94 Wis. 225, 68 N. W. 1015, and *Tyson v. Richardson*, 103 Wis. 397, 79 N. W. 439. As most fundamental among these must be borne in mind that the infant is always the ward of every court wherein his rights or property are brought in jeopardy, and is entitled to most jealous care that no injustice be done him. The guardian ad litem is appointed merely to aid and enable the court to perform that duty of protection: *Cole v. Superior Court*, 63 Cal. 86, 89, 49 Am. Rep.

78. By circuit court rule 9, he must be an officer of that court, and that official character both supports him in the performance of his duties and limits his rights and conduct. His duties are of the highest character, especially when, as now, he is an attorney at law, owing not only fidelity and wisdom, but also the duty of investigation of the legal rights of his ward and advocacy thereof. The performance of his important functions has already won for this claimant commendation from this court, and it is at the express wish of all of its members that the writer of this opinion reasserts approval of the loyalty to the wards' interests, the fearlessness and courage against severe opposition and at the sacrifice of personal comfort, and the distinguished industry and professional learning and ability which have characterized Mr. Richardson's performance of those official duties resulting from his appointment as guardian ad litem down to the time of presentation of his formal demand for compensation in the sum of five thousand dollars.

Not less in measuring the proper allowance to a guardian ad litem out of the estate he conserves than in strengthening his arm to conserve it must the fact be considered that he is a public officer—a trusted attorney, aiding his own court as an official duty cast upon him by his appointment, a duty which no lawyer can with propriety decline, even though it may be compensated inadequately or not at all. A duty of public service without such compensation as would be demanded for similar labors for individuals rests upon <sup>579</sup> all members of the community, and is cheerfully performed in positions of all grades from jurymen and town supervisors upward. Especially has been recognized from earliest times the duty of lawyers to aid their courts in the protection of the helpless or the oppressed without thought of pecuniary benefit. We have indulged in thus much of generalization as to the true attitude of a guardian ad litem, which applies as well in some measure to other officers of courts, such as trustees, receivers, and the like, to lead up to the true rule which should guide courts in fixing the compensation and expenses which should be allowed them. As it would be the duty of an attorney, however eminent, to defend one accused of crime for the very moderate compensation now fixed by statute, or for none at all, if none were allowed, as it is the duty, and, we are pleased to observe, the custom, of attorneys to serve the court in disbarment proceedings without compensation, so it is a professional duty to aid the court as guardian ad litem, either without compensation if the case requires it, or, when funds ex-



ist, for compensation to be measured by the standard of official emoluments, rather than by that of the highest prices demanded and paid between individuals free to contract as they will. The judge whom the claimant was called to aid was devoting his learning and ability to the public service for pecuniary reward wholly incommensurate to what the same industry, learning and ability would have commanded at the hands of clients. It is with such illustrations, rather than with private contracts, that comparisons should be made in measuring the allowance to claimant. In another case (*Speiser v. Merchants' Ex. Bank*, 110 Wis. 506, 86 N. W. 243), we have taken occasion to point out the alarming tendency among officers of courts, and even of the courts themselves, toward reckless demand and allowance of unreasonable and excessive compensation out of funds within their grasp. While those remarks are far less applicable to the situation in this <sup>580</sup> case, we cannot but feel that reference to them is wise, to the end that courts may have continually in mind the peril of lapsing into the abuses mentioned.

The first contention made by appellant against the allowances to the claimant is that he is bound by contract to the sum of five hundred dollars—two hundred and fifty dollars for his services in circuit court, and a like sum in this court. The facts upon which this contention is predicated are substantially uncontroverted. They are set forth in substance in the accompanying statement of facts. Mr. Richardson does not dispute the accuracy of Mr. Spence's narrative of the conversation between them, nor the giving of the receipt in full upon the completion of the hearing in circuit court. We can see no escape from the conclusion that, by accepting the appointment in pursuance of that conversation, Mr. Richardson limited himself to the compensation of two hundred and fifty dollars for his services in the circuit court, which were performed in exact compliance with the arrangement so made. They were in no respect enhanced by any unexpected conduct on the part of others, and they were performed, and payment therefor accepted, without suggestion or intimation that he expected to receive for those services any other or further compensation. Nor did the language used by Mr. Spence fairly justify any such mental reservation or expectation as Mr. Richardson claims that he had, to the effect that, if a fund was found to exist and belong to his wards, he should be paid, in addition, a sum to be fixed by the court. In considering the reasonableness of this arrangement, it must not be forgotten that Mr. Richardson was then young

in practice, with reputation for ability not widely established, and apparently without large and engrossing practice from which his attention and labors would necessarily be diverted to considerable pecuniary loss. The case was an important one, likely to attract attention, and presenting questions in the immediate line of Mr. Richardson's special studies, so that distinguished service therein <sup>581</sup> would be likely to be highly advantageous to him in establishing before the bar and the public his qualifications as a real estate lawyer. There seems to us no inherent improbability, in that situation, that he would have assented to Mr. Spence's proposal, and deemed it at least reasonably beneficial to himself. We conclude, therefore, that for the services rendered in circuit court he must be held to have been paid in full, and to be not entitled to any further allowance.

At this point in the history of the case, however, the situation changed so entirely and radically from that within the contemplation of both Mr. Richardson and Mr. Spence that the arrangement as to rate of compensation for further services can have no application. Instead of the action being brought to the supreme court by Mr. Spence without trouble or burden of liability to Mr. Richardson, the plaintiff, upon the advice of new counsel, determined to rest upon the judgment of the circuit court, which had denied to Mr. Richardson's wards any interest whatever in the real estate involved. For a period approximating two years, Mr. Richardson was, of course, thrown into a situation of doubt and uncertainty as to his duty, and still more as to how it could be performed. Convinced as he was of the existence of valuable rights in his minors, and that injustice had been done them by the decision of the trial court, yet he was confronted in that conclusion with the decision of Judge Johnson, an equity lawyer of high repute, and with the expressed opinion of counsel of large experience and brilliant reputation, all of which might well give pause to a lawyer of his youth and limited experience. Again, he was without means to justify him in assuming the possible expenses attending an appeal, and, as he testifies, without relations with those who could furnish the necessary bond. At this stage, too, he was met with what we cannot construe otherwise than as threats of assault upon the sincerity of his motives and upon his professional integrity should he persist in further litigating the question upon <sup>582</sup> which judgment had been rendered, and was refused not only all aid in securing a decision from the ultimate tribunal, but any concessions or stipulations to remove obstacles in his path.

When at last his convictions as to his wards' rights and his duty to further vindicate them triumphed over his reluctance to incur all of these obstacles, he was met by most strenuous efforts of him who had accepted, by appointment as guardian, the duty of promoting the legal rights of these minors to the utmost, to remove respondent from his position as guardian ad litem, and to dismiss his appeal from this court. Such things were not within the contemplation of anyone when Mr. Richardson consented to present the rights of the minors in this court for a compensation of two hundred and fifty dollars, and reversed the situation so entirely that we cannot hold him bound thereby, and therefore proceed to consider the proper measure of his compensation.

Appellant's counsel here presents two questions of law: 1. He denies the right of a guardian ad litem under any circumstances to employ counsel at the expense of the estate, without previous order of court; and 2. Power to impose any of the expenses of settling his account, especially the attorneys' fees in that proceeding. On neither of such contentions does the brief give us material aid. To the first are cited *Matter of Johnston*, 6 Dem. Sur. 355, and *Smith v. Smith*, 69 Ill. 308. The first of these merely declares the general practice of the surrogates in New York not to allow attorney fees to special guardians appointed on applications for administration. The latter decides in favor of the right of guardian ad litem to reimbursement of attorneys' fees if reasonable and reasonably necessary, although not expressly authorized. To this decision the court added, by way of caution: "In such cases the better practice would seem to be, where the guardian ad litem is appointed and he believes that his ward has rights, for him to apply to the court for <sup>583</sup> leave to employ counsel; and the court should, in granting leave, fix the amount that might, if required, be expended for the purpose of the defense, which, if it, from the protracted litigation or otherwise, should prove insufficient, the court, on being satisfied of the fact, might increase the sum."

With this cautionary suggestion we entirely concur. The policy in this state, as indicated by circuit court rule 9, is that attorneys be appointed to such position on the assumption that the guardian himself will be able to render the professional services necessary to any ordinary situation. Hence the employment of additional counsel can only be justified by unusual or extraordinary circumstances. If the guardian takes such step without an order of court, he assumes the peril that it may be



disproved, and he be left to bear the expense personally. Nevertheless, if, after the fact, it appears that such precaution was reasonably necessary for the welfare of the minors, and such as the court would have authorized in advance had application been made, no reason is apparent why the reasonable expense should not be allowed. Much the same considerations are involved as were suggested with reference to taking appeal in *Tyson v. Tyson*, 94 Wis. 225, 68 N. W. 1015; *Hamacker v. Commercial Bank*, 95 Wis. 359, 362, 70 N. W. 295; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 294, 10 Sup. Ct. Rep. 1019; *Cole v. Superior Court*, 63 Cal. 86, 49 Am. Rep. 78; *Henry v. Henry*, 103 Ala. 582, 15 South. 916.

We cannot doubt that a situation presented itself in this case which made it very seemly and prudent that the guardian ad litem should invoke the aid of a lawyer of eminence, ability, and experience at the time Mr. Flanders was consulted. As we have pointed out already, Mr. Richardson's own judgment was in antagonism to the views of Judge Johnson, of Mr. Spence, and of General Bragg. He was a young man, who had not extended experience by which to test the accuracy of his own reasoning and judgment, and might well hesitate, however clear his conclusions, to incur further labor <sup>584</sup> and expense without confirmation from a lawyer able to supply those deficiencies. One subject to be discussed upon his appeal, as he had already been assured by General Bragg, would be his own sincerity in moving it, thus rendering personal argument embarrassing and probably of lessened efficacy to his wards. In view of these considerations, and of Mr. Flanders' ability to procure the needed sureties for an appeal, we concur with the circuit court in approving reasonable expense for securing his services. As to the amount which should be allowed the guardian as a disbursement for Mr. Flanders' services, however, the action of the referee and the circuit court seems to us unwarranted by the record as now presented. Of course, we cannot, as between the counsel and his employer, even express an opinion of the reasonableness of the charge made, for Mr. Flanders is not a party and has had no opportunity to be heard, not even having been called as a witness. The services may, as intimated, have considerably exceeded what are described; but, such fact not being made to appear, we cannot consider it. We can only pass upon the amount of credit to Mr. Richardson for such services as he has proved to have been rendered, in the light of such knowledge as we may have of those in this court. No evidence of reasonable

value was introduced on the trial below, and, since such as were proved to have been rendered came more fully under the observation of this than of the circuit court, no reason exists that we should not pass judgment upon them untrammelled by the finding of the referee and circuit court. The only services disclosed by the record outside of this court consisted in the examination and approval of Mr. Richardson's brief as to his right to appeal, and of his brief upon the merits of the construction of the deed under which the land was held. The claimant's testimony is that these briefs were submitted, and were returned by Mr. Flanders with his unqualified approval the same day; that the brief upon which the motions <sup>585</sup> were heard in this court was written by Mr. Richardson, and adopted by Mr. Flanders. The only further service was the argument in this court, performed in a single day. It must be borne in mind that, while courts may approve after the fact that which it were better to have submitted for their approval in advance, they ought not to allow themselves to be affected by contracts which the guardian may have made to allow more than they would have allowed upon such preliminary application. Had the explanation been made in advance of the character of the services desired to be obtained from Mr. Flanders, such as they now appear by the record, we cannot believe that a contract to pay five hundred dollars would have been deemed necessary, or would have been approved. We are constrained to the view that one-half of this amount, two hundred and fifty dollars, is liberal allowance for expense necessarily incurred by the guardian for the service which he claims to have received, and that his charges against his wards should be limited to that sum.

The second rule of law contended for, namely, that a guardian *ad litem* can have no allowance either for services or, more especially, for attorneys' fees paid in the hearing on his account, is not supported by the citation of any authorities, but the contrary seems well sustained when the officer acts fairly, makes full disclosure, and does not make unreasonable demands for credit or allowance: 2 Daniell's Chancery Practice, \*1411; *Kingsbury v. Powers*, 131 Ill. 182, 198, 22 N. E. 479; *Clark v. Anderson*, 13 Bush, 111, 116; *Bendall v. Bendall*, 24 Ala. 295, 305, 60 Am. Dec. 469. This obviously must be so if the guardian is to receive fair compensation for services. It would be contradictory to fix such fair and reasonable compensation if the sum so fixed must be reduced to something less by imposing on him the necessary expense of passing his accounts—a step

which his duty requires. The question whether employment of an attorney on such hearing should be compensated out of the estate as an expense is a delicate one. Only under extraordinary conditions <sup>586</sup> can it be proper. Usually, the guardian should be content to submit a plain statement of his services and disbursements to the court under which he has performed them, leaving to that court to fix the amount in the light of its own opportunity for observation and of any evidence it may desire. Ordinarily, vehement contention is not to be expected, and necessity for a hired advocate can hardly exist. Notwithstanding all these considerations, however, it still remains in each case a question for the court whether the extraordinary circumstances do exist to make necessary or proper such employment, and whether the services rendered by the attorney are merely those which the guardian might himself have rendered, or are such as, owing to the situation, he could not properly perform. There is no absolute limit on the power of the court to allow such disbursement; merely considerations restrictive of the exercise of its judgment and discretion: *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. Rep. 1019.

Considering, in the light of these views, the employment of Mr. Monroe, we find that the petitioner first presented his claim for allowance and compensation entirely in accord with the above suggestions, specifying no amount, but submitting the whole question to the court, upon a full and explanatory report, in July, 1897, and then devoted ten days to the investigation of the question of law whether that allowance could be made by the circuit court, and whether it could be so imposed as a lien upon the remainder in the real estate as to enforce its payment—a field of inquiry which the court must investigate, and in which aid from the guardian was due and necessary. This petition was denied, as already stated, and an appeal taken to this court. At substantially this stage Mr. Monroe's retainer came about. As to that Mr. Richardson testifies: "I employed Mr. Monroe, with whom at that time I was in partnership, to take exclusive charge of this proceeding, for the reason that I was about to go away for an indefinite <sup>587</sup> period, and be absent from the state, and also for the reason that, it being a matter in which I personally was interested, I thought it advisable to have it in charge of another attorney."

He elsewhere testified that an additional consideration was the character of the opposition to this account, which had developed out of the appointment of Mr. Mallory as general guard-



ian, and the employment by him in that capacity of an attorney who had declared vehement antagonism to any allowance in favor of the guardian ad litem. Mr. Monroe wrote the brief, argued the appeal in this court, and, after the remittitur, conducted the trial before the referee and argument before the circuit court upon this petition for allowance, and presents a bill of five hundred dollars for his services up to the commencement of the hearing before the referee, and of one hundred and fifty dollars in that hearing, to which fifty dollars was added by the court for the argument upon the referee's report. In the light of this evidence, we are unable to find justification for specific charge, as for a disbursement on behalf of the estate, for Mr. Monroe's services, other than upon the hearing before the referee. The earlier procedure involved nothing of fact, did not draw into consideration either the conduct or the motives of the guardian ad litem, and the reason given by Mr. Richardson for the employment of Mr. Monroe, then associated with him in partnership, was one going wholly to his own convenience. It was substantially requesting Mr. Monroe to perform Mr. Richardson's own duties as guardian ad litem during the latter's absence. That being so, and no criticism being suggested that Mr. Monroe's rendition of the services was not as effective and useful as would have been Mr. Richardson's own, the character and amount of those services can be taken into consideration only as bearing upon the amount of proper allowance to the guardian, and the charge as for a distinctive disbursement must be disallowed.

588 The hearing before the referee, however, presents an unusual and difficult situation. At that hearing the entire conduct of Mr. Richardson was on trial; the facts as to the detail and volume of the services rendered by him, their quality, and the embarrassments and opposition under which they were performed, all were to be investigated, and in large measure must call for extended examination and cross-examination of himself as a witness. All this would have rendered his conduct of the hearing as his own advocate highly embarrassing, if not unseemly, and to this extent we approve the action of the referee and of the court below in treating Mr. Monroe's employment and payment as a proper disbursement; nor do we see any reason to disapprove the amount of two hundred dollars, fixed therefor, which is upon the basis of twenty-five dollars per day. The remaining question is whether the amount fixed by the court as compensation for the guardian's own services is reason-

able from the point of view already suggested as the true one. That allowance, largely exceeding the amount fixed by the referee, so closely corresponds with the opinions of several leading members of the bar testifying as experts that we cannot avoid the conviction that the court deemed himself substantially controlled thereby, as he would be by a consensus of witnesses on other subjects. Such, however, is not the true rule as to compensation of court officers, and especially of attorneys for services of a professional character. On that subject the opinions of others in the same profession are advisory only, and, although unanimous, are not controlling. Judges are as well able to form correct opinions as are other lawyers: *Taylor v. Chicago etc. R. R. Co.*, 83 Wis. 645, 648, 53 N. W. 855; *Remington v. Eastern Ry. Co.*, 109 Wis. 154, 84 N. W. 898, 901; *Trustees v. Greenough*, 105 U. S. 527; *Harrison v. Perea*, 168 U. S. 311, 325, 18 Sup. Ct. Rep. 129. Again, the record before us makes apparent that the lawyers who estimated respondent's services at five thousand dollars gave considerable weight to the <sup>589</sup> hypothesis that the value of the property conserved to the remaindermen approximated one hundred and fifty thousand dollars. This was not the fact. A mere remainder in property or in a fund is not of the same value as the fund itself. As the whole cannot be greater than the sum of its several parts, the value of the remainder can only be the balance remaining after deducting the prior estate, which, at the age of the life tenant, Mrs. Ruggles, approximates two-thirds of the property, leaving value of the remainder only about fifty thousand dollars. We by no means decide that this variance should make any very considerable difference in the fair value of the services rendered: *Smith v. Smith*, 69 Ill. 313. We mention it because the expert witnesses evidently gave much weight to the stated value of the estate, some of them justifying their opinions by the suggestion that three per cent is a moderate collection fee. For both these reasons their estimates not only did not constrain the court to an allowance of five thousand dollars, but they hardly supported it.

In view of the foregoing considerations, and of the further fact that most of Mr. Richardson's services not already compensated in full were performed before this court, and none of them, except the accounting, before the circuit judge who made the order appealed from, we have considered the whole subject as an original one, and reach the following conclusions: 1. That the respondent is already paid in full for his

services on the merits in circuit court, which, by the way, involved more than one-third of all time spent by him; 2. That the disbursements for expenses of travel, seventeen dollars and fifty cents, should be allowed; 3. That not more than two hundred and fifty dollars to Mr. Flanders and two hundred dollars to Mr. Monroe can be approved as specific expenses chargeable to the estate for services other than such as should have been performed by the guardian ad litem; and 4. That a fair and reasonable allowance to the guardian ad litem for all services as such, other than those in the circuit court, already compensated by payment of <sup>590</sup> two hundred and fifty dollars, is the sum of two thousand five hundred dollars, and interest on all such credits from July 19, 1897.

By the Court. The order appealed from is reversed, and the cause remanded with directions to enter order allowing the guardian ad litem for all services and expenses the sum of two thousand nine hundred and sixty-seven dollars and fifty cents, with interest from July 19, 1897, with provisions for lien and enforcement as in the reversed order.

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**Guardian ad Litem.**—An attorney at law acting as the guardian ad litem of an infant must look to the court alone for the amount of his compensation. No other or greater amount than that allowed by the court can be collected: *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 58 N. W. 852. A guardian ad litem cannot bind those whom he represents by a contract with an attorney, fixing his compensation in the suit: *Cole v. Superior Court*, 63 Cal. 86, 49 Am. Rep. 78.

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## PITTSBURG TESTING LABORATORY v. MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY.

[110 Wis. 633, 86 N. W. 592.]

**MUNICIPAL CORPORATIONS—MECHANICS' LIENS.**—On grounds of public policy, the mechanic's lien laws do not, in the absence of express provisions, apply to public buildings erected by states, counties, and towns for public use.

**MECHANICS' LIENS—QUASI PUBLIC CORPORATIONS.**—Under a general mechanic's lien law, no lien attaches to a particular part of a railroad, or property of any other quasi public corporation, essential to its operation and maintenance for public purposes.

**MECHANICS' LIENS, WHEN ENFORCED—QUASI PUBLIC CORPORATIONS.**—Under the general language of a mechanic's lien law, a lien may be enforced against such structures and prop-



erty of a railway or other quasi public corporation as are not essential to the operation and maintenance of the railway or other business for the public purposes for which it was established.

**MECHANIC'S LIEN—STREET RAILWAY AND ELECTRIC LIGHT COMPANY.**—A contractor may enforce a mechanic's lien against a new power-house of a street railway and electric light company, where it is admitted that such power-house is not essential to the operation and maintenance either of the company's street railway or of the electric light plant for the public purposes for which the company was established.

Hoyt & Owell and F. M. Hoyt, for the appellant.

Miller, Noyes & Miller and George H. Noyes, for the respondent.

<sup>634</sup> CASSODAY, C. J. This is an appeal from an order sustaining a demurrer to the complaint to enforce a subcontractor's lien upon the premises described. The complaint, after alleging that during the times therein mentioned the plaintiff was a corporation located at Pittsburg, Pennsylvania, and that the defendant the Milwaukee Electric Railway and Light Company was a corporation located at Milwaukee and organized to engage and engaged in the business of operating in the city of Milwaukee a system of street railways and an electric light and power plant, and that the defendants Warren and John Roberts were copartners engaged in the business of civil engineers and contractors, alleges, in effect, that the electric company sells electric light and power produced at such plant, and has a contract with the city of Milwaukee for lighting certain streets therein, which contract was entered into December 15, 1895, and by its terms expires December 15, 1900; that the electric company is now engaged in carrying out and completing such contract by means of its plant and appliances "other than the new power-house hereinafter mentioned"; that the electric company had, long prior to entering upon the construction of such new power-house, constructed power-houses in various parts of the city and placed therein proper engines, boilers, and machinery, and has ever since operated and used, and is now operating and using, the same for the purpose of producing electricity; that the last-named power-houses and appliances therein contained are amply sufficient for the purpose of supplying <sup>635</sup> with electricity and operating the system of street railways and electric light and power plants of the electric company as they have been heretofore and now are constructed and carried on, and sufficient to enable it to carry out and fulfill its contract with the city until the expira-

tion thereof; that the electric company is contemplating extensions and additions to its system of street railways and to its lighting and power plants; that to operate such systems and plants when so increased and extended as contemplated a new power-house is necessary; that for the purpose of constructing such new power-house the electric company, in 1898, caused plans and specifications to be prepared and made therefor by an architect of the city; that prior to February 6, 1899, Warren Roberts & Co. were employed by and entered into a contract with the electric company to perform work and labor and to furnish materials according to plans and specifications in and about the erection and construction of a brick building to be used as such new power-house owned by the electric company, and situated on the land therein specifically described; that in and by such contract it was provided that all the structural material used and employed in the construction of such building should be tested and inspected by this plaintiff at the expense of Warren Roberts & Co.; that prior to February 6, 1899, the plaintiff was employed as subcontractor by Warren Roberts & Co., under their contract with the electric company, to test and inspect such structural material; that as such subcontractor, under such employment, the plaintiff performed work and labor for Warren Roberts & Co. between February 6, 1899, and August 19, 1899—that is to say, inspected and tested the structural material used and employed by Warren Roberts & Co. in the construction of such building under and pursuant to the provisions of the plans and specifications aforesaid; that the exhibits attached contain a true and correct statement of the work, tests, and inspections <sup>636</sup> thus performed by the plaintiff, showing the amount of work done and the prices therefor; that such prices were the prices agreed upon between the plaintiff and Warren Roberts & Co. for the doing of such work; that all of such work and labor was done and performed upon structural material which was sold and furnished to be used, and which was actually used, by Warren Roberts & Co., in the construction and erection of such new power-house; that such new power-house stands and is situated upon two lots therein described; that the electric company, at the time of making such contract with Warren Roberts & Co., was, and ever since has been, and now is, the owner of the land and of the new power-house building situated thereon; that the same does not exceed one acre in extent, and is within the limits of the city; that the last date of the performance of such labor of this plain-

tiff was August 19, 1899; that September 20, 1899, this plaintiff gave to the electric company the notice of its claim for a lien and statement thereof, of which true copies are thereto attached; that October 13, 1899, this plaintiff gave to the electric company the notice and statement of the work, tests, and inspections, of which true copies are thereto attached; that November 29, 1899, this plaintiff duly filed, as required by law, its claim for lien for the amount due and owing to it from Warren Roberts & Co., in the office of the clerk of the circuit court for Milwaukee county, a copy of which claim for lien is thereto attached; that such claims and all the allegations thereof are true, and are thereby made a part of this complaint; that one year has not elapsed between the doing of such work and labor and the commencement of this action; that there is now due and owing to the plaintiff from Warren Roberts & Co., by reason of such claim, seven hundred and seventy-seven dollars and twenty-nine cents, and interest thereon from August 19, 1899. Wherefore, the plaintiff demands judgment that the amount of its lien be ascertained and adjudged and enforced against such premises, with costs.

<sup>637</sup> The question presented is whether the facts stated are sufficient to entitle the plaintiff to a subcontractor's lien upon the premises described, under the statutes of this state, for the work and labor performed: Stats. 1898, secs. 1775, 1775a, 3314, 3315. The statutes declare, in general terms, in effect, that the party performing such work and labor shall have a lien upon such building and the interest of the owner thereof therein upon complying with the provisions of such statutes: Stats. 1898, secs. 1775, 1775a, 3314, 3315. It is virtually conceded that the facts alleged would entitle the plaintiff to such lien if the premises were owned by a private party, and used for private purposes. But it is claimed, and the trial court manifestly held, that such statutes are not applicable to property of a quasi public corporation engaged in operating a system of street railways and an electric light and power plant in the city of Milwaukee. In support of such claim counsel rely upon certain decisions of this court; and counsel for the plaintiff rely upon certain other decisions of this court in support of its claim for a lien herein. We shall not here undertake to harmonize or reconcile all such decisions, much less all that has been said in the different opinions in support of such decisions; but we will attempt to decide this case in accordance with the principles of law applicable to the facts stated.



The early case of *Hill v. La Crosse etc. R. R. Co.*, 11 Wis. 214, 221, was an action to enforce a mechanic's lien for building a part of a brick block, which, had it been completed according to the contract, would have extended "along the whole front of the block, upon the street," being four hundred and twenty feet, and to the depth of fifty-five feet, and constituted the defendant's depot in Milwaukee. The "judgment was recovered by default, and was entered for a lien upon the interest of the company in the whole block 41." On the application of the company for a modification of the judgment, it was made to appear "that the railroad track was laid across the 638 east part of the block between the buildings and the river; that the whole block was not necessary or convenient for the use of the buildings erected, which were designed for stores and offices"; and thereupon the court modified the judgment "so as to confine the lien to the west sixty feet of the particular lots on which the building, as far as erected, actually stood." On the appeal by the plaintiff from such modified judgment, the same was reversed by this court, which held that the plaintiff was entitled to a lien upon one acre in the block; and that, as the block exceeded an acre, it was necessary for the court to determine to what portion of the block the lien extended; and so this court came to the conclusion "that the lien of the appellants was equivalent to a mortgage by the company of an acre in the block, and that it should be adjudged to cover the south one acre of the block, extending from the river to the street, and that it should be so sold as to leave what remained to the company in a compact form, extending also from the river to the street." The court reached that conclusion expressly because the premises were "at the very end of the road, and where, from the very nature of the premises, it would be more convenient to both parties" that they should be so divided, in order that each party should "have access both to the river and the street." As the land was situated at the very end of the railway tracks, the lien could be thus enforced without destroying any of the corporate franchises of the company. The enforcement of the lien could at most only result in acquiring some of the property of the corporation not essential to the enjoyment of such corporate franchises. Upon that ground the decision may be sustained, although the reasoning of the opinion may not, in all respects, be approved. In fact, the learned justice who wrote the opinion, in a note to the case, states that some of such reasoning was inapplica-

ble. The decision seems to have gone largely upon the ground of the superior equity.

<sup>639</sup> Two years after that decision, a mechanic's lien in favor of a subcontractor was enforced by this court against the depot of a railroad company and a certain amount of land upon which it was situated, seemingly without reference to or consideration of the question whether the corporate franchises of the company were thereby destroyed or impaired: *Carney v. La Crosse etc. R. R. Co.*, 15 Wis. 503, 509. At the same term of the court it was held that a municipal corporation was not liable to garnishment in an attachment suit: *Burnham v. Fond du Lac*, 15 Wis. 193, 82 Am. Dec. 668. That case was followed in *Buffham v. Racine*, 26 Wis. 449, and *Merrell v. Campbell*, 49 Wis. 535, 35 Am. Rep. 785, 5 N. W. 912. Upon the principle involved in those cases, it was subsequently held by this court that the lien of a subcontractor, under the statute, did not extend to machinery furnished by him, and placed in a building constituting a part of the waterworks of a city: *Wilkinson v. Hoffman*, 61 Wis. 637, 21 N. W. 618. This was not put upon the ground that the general language of the statute (section 3314) was not broad enough to authorize such lien, but on the grounds of public policy, and because the objects of municipal government forbid that the clause of the statute referred to should be held applicable to machinery placed in a building constituting a part of the city waterworks; that it stood upon the same ground as where material is furnished for a county courthouse, jail, public school building, or other public building, which are held to be exempt from the operation of mechanic's lien laws; and that upon the grounds of public necessity and convenience it was held that the lien did not attach. That case has been repeatedly approved by this court: *Platteville v. Bell*, 66 Wis. 326, 28 N. W. 404; *Chapman etc. Mfg. Co. v. Oconto W. Co.*, 89 Wis. 264-271, 46 Am. St. Rep. 830, 60 N. W. 1004; *Strike v. Wisconsin etc. Ins. Co.*, 95 Wis. 586, 70 N. W. 819. A prominent author states that: "On the grounds of public policy, the mechanic's lien laws do not, in the absence of express provisions, apply to public buildings erected by states, counties, and towns for public use": <sup>640</sup> 2 Jones on Liens, 2d ed., sec. 1375, citing many adjudications from numerous states. In support of the proposition, see *Leonard v. Brooklyn*, 71 N. Y. 498, 27 Am. Rep. 80; *Parke Co. Commrs. v. O'Connor*, 86 Ind. 531, 44 Am.

Rep. 338. The same rule is there stated as applying to school-houses and waterworks so erected for public use. The "public policy" mentioned seems to be nothing more than an enforcement of the old common-law rule, as stated by Savage, C. J., that: "When a statute is general, and any prerogative right, title, or interest would be divested or taken from the king, in such case he shall not be bound, unless the statute is made by express words to extend to him": *People v. Herkimer*, 4 Cow. 348, 15 Am. Dec. 379. In an earlier case in the same state, it was said that: "In a representative government, where the people do not and cannot legally act in a body, where their power is delegated to others, and of necessity must be exercised by them, if exercised at all, the reason for applying the maxim is equally cogent. . . . On the ground of expediency and public convenience, this was necessary. As an attribute of sovereignty, it was equally important to be preserved": *People v. Gilbert*, 18 Johns. 229.

The rule thus stated by Chief Justice Savage was, at an early day, expressly sanctioned by the supreme court of the United States, and they added that: "The doctrine that the government should not, unless named, be bound by an act of limitations, is in accordance with that just cited from Bacon, because, if bound, it would be barred of a right; and in all such cases is not to be construed to be embraced unless named, or, what would be equivalent, unless the language is such as to show clearly that such was the intent of the act. . . . The real ground is a great principle of public policy, which belongs alike to all governments, that the public interest should not be prejudiced by the negligence of public officers to whose care they are confided": *United States v. Knight*, 14 Pet. 315. See, also, *Dollar Sav. Bank v. United States*, 19 Wall. 239; *United States v. Herron*, 20 Wall. 263. As stated in one of these cases, the same principle has been decided in several of the states, and <sup>641</sup>all upon the same ground. In some of the cases it is held that the statutes of limitation do not run against the state unless expressly declared: *People v. Gilbert*, 18 Johns. 229; *Commonwealth v. Hutchinson*, 10 Pa. St. 466. In other cases the rule has been applied to the discharge of bankrupts or insolvents. In the administration of government the municipality is the agency of the state.

The question recurs whether the rule applicable to municipalities applies also to quasi public corporations. Upon that question there seems to be a diversity of opinion: 2 Jones on



**Liens, secs. 1378, 1618 et seq.** There can be no question in this state but that electric railway corporations, as well as other railway corporations, although constructed for the private emolument of those engaged in such enterprises, are highways, which have, nevertheless, been established under the authority of law, and primarily for the convenience and benefit of the public. They both have the right of eminent domain: Const., art. 1, sec. 13; Stats. 1898, secs. 1845-1863a. Such being the relationship between the corporation and the public, the supreme court of the United States has held that: "Ordinary lien laws giving to mechanics and laborers a lien on buildings, including the lot upon which they stand, or a lien upon a lot or farm or other property for work done thereon, or for materials furnished in the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges, or other property of a railroad company that may be essential in the operation and maintenance of its road for the public purposes for which it was established": *Buncombe Co. Commrs. v. Tommey*, 115 U. S. 122, 5 Sup. Ct. Rep. 626, 1186.

In that case Mr. Justice Harlan, speaking for the whole court, said, in effect, that "a different construction of the statute would enable parties having liens" for small amounts "to destroy a public highway, and defeat the important objects which the state intended to subserve by its construction. No such intention should be imputed to the legislature <sup>642</sup> unless the words of the state clearly require it to be done": *Buncombe Co. Commrs. v. Tommey*, 115 U. S. 129, 5 Sup. Ct. Rep. 626, 1186. Thus it has been held in Pennsylvania that "the results to be produced to the public by public corporations" for building bridges, turnpikes, railroads, and the like "cannot be disturbed by the seizure by creditors of any part of the property essential to their active operations": *Foster v. Fowler*, 60 Pa. St. 27. Debts against such corporations must be recovered in the ordinary way, so as to allow them to progress with their undertaking, and accommodate the public: *Foster v. Fowler*, 60 Pa. St. 27. Such rules were applied in that case to a corporation for introducing water into a town for the accommodation of its inhabitants: *Foster v. Fowler*, 60 Pa. St. 27. The principle involved in that case was approved in a later case in the same court, "where a mechanic's lien was sustained on the ground that the public was not directly interested in the business of the defendant corporation": *Girard*

Point etc. Co. v. Southwark F. Co., 105 Pa. St. 248. And, also, see *Guest v. Merion Water Co.*, 142 Pa. St. 610, 615, 21 Atl. 1001; *Reynolds v. Reynolds etc. Co.*, 169 Pa. St. 626, 47 Am. St. Rep. 935, 32 Atl. 537. On the other hand, it has been held in the same state that: "Lands purchased by a railroad company beyond what are actually dedicated to corporate purposes are bound by the lien of judgments against the corporation, and are liable to be levied in execution, and sold by the sheriff, as are the lands of any other debtor; but the purchaser at such sale takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how acquired by the corporation": *Plymouth R. R. Co. v. Colwell*, 39 Pa. St. 337, 80 Am. Dec. 526.

And yet in the same case, Woodward, J., speaking for the court, said: "Though the corporation, in respect to its capital, is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked, therefore, by either the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation": *Plymouth R. R. Co. v. Colwell*, 39 Pa. St. 339, 80 Am. Dec. 526. <sup>643</sup> See, also, *Oakland Ry. Co. v. Keenan*, 56 Pa. St. 203. The rule of construction mentioned, and some of the adjudications cited in support of it, have repeatedly been sanctioned or recognized by this court: *Yellow River Imp. Co. v. Wood Co.*, 81 Wis. 560, 562, 51 N. W. 1004, 17 L. R. A. 92, and note; *Fond du Lac W. Co. v. Fond du Lac*, 82 Wis. 322, 329, 52 N. W. 439; *Chapman Valve Mfg. Co. v. Oconto W. Co.*, 89 Wis. 264, 46 Am. St. Rep. 830, 60 N. W. 1004; *Chicago etc. R. R. Co. v. Milwaukee*, 89 Wis. 506, 62 N. W. 417; *State v. Anderson*, 90 Wis. 550, 63 N. W. 746; *Wright v. Milwaukee etc. Co.*, 95 Wis. 29, 60 Am. St. Rep. 74, 69 N. W. 791; *Chicago etc. R. R. Co. v. Forest Co.*, 95 Wis. 80, 89, 70 N. W. 77; *State v. Anderson*, 97 Wis. 114, 72 N. W. 386. In a recent case Mr. Justice Marshall said: "Much confusion often happens from a failure to distinguish between those franchises that are corporate in a strict legal sense and not really property of the corporation, and franchises acquired by a corporation after corporate existence commenced, that it may part with if they be assignable, or be deprived of without corporate existence being affected, and which may survive the death of the corporation": *State v. Portage City etc. Co.*, 107 Wis. 446, 83 N. W. 699.

The rule to be deduced from the best considered cases seems to be that a railway is an entirety, and that under the general language of a statute no lien attaches to a particular section or part of the road essential to its operation and maintenance for public purposes; but that, under the general language of such statutes, a lien may be enforced against such structures and property of the corporation as are not essential to the operation and maintenance of the railway for the public purposes for which it was established. In addition to the authorities cited, see *National etc. Works v. Oconto etc. Co.*, 52 Fed. 43, 68 Fed. 1006; 2 *Jones on Liens*, 2d ed., secs. 1618, 1619; 3 *Elliott on Railroads*, secs. 1066-1075. In one of these sections Mr. Elliott says: "The courts will not presume that the legislature intended to subject the public to the annoyances and inconveniences <sup>644</sup> which would necessarily attend the enforcement of a mechanic's lien against a railroad under a general mechanic's lien law, and will not so construe it, unless such an interpretation is clearly required": *Elliott on Railroads*, sec. 1066.

The distinction between the cases where liens cannot be enforced against a particular structure or section of a railway, essential in its operation and maintenance for the public purposes for which it was established, and the cases where the lien may be enforced against a particular structure belonging to such corporation, but not so essential to its operation and maintenance, and hence which may be taken from the corporation without destroying or impairing its corporate franchises, has not always been observed in this court. The question is not whether the legislature may, in its wisdom, authorize the enforcement of such lien in any case, but whether the general language of our statute shall be so construed as to authorize a pro tanto destruction of the corporate functions created as an entirety, and primarily for the benefit of the public. In other words, courts are not authorized, in the construction of such general language, to repeal pro tanto the charter of a corporation so created primarily for the public benefit, especially in violation of a well-established rule of construction of such general statutes so far as public rights are concerned. Such rule was not observed in *Carney v. La Crosse etc. R. R. Co.*, 15 Wis. 503, and the more recent case of *Purtell v. Chicago etc. Co.*, 74 Wis. 132, 42 N. W. 265. In the case at bar it is admitted that the defendant was engaged in carrying out and completing its contract with the city by means of its plant and



appliances "other than the new power-house" in question. In other words, it is admitted that the new power-house, against which the lien is sought to be enforced, was not essential to the operation and maintenance of the defendant's system of street railways, and an electric light and power plant for the public purposes for which the defendant corporation was established. It follows <sup>645</sup> from what has been said that the plaintiff is entitled to such lien.

By the Court. The order of the circuit court is reversed, and the cause is remanded with directions to overrule the demurrer and for further proceedings according to law.

Bardeen, J., took no part.

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**Mechanic's Lien—Public Building.**—Mechanics' liens can be created against public buildings only when the right is expressly conferred by the statute: *Atascosa County v. Angus*, 83 Tex. 202, 29 Am. St. Rep. 637, 18 S. W. 563; *Mayrhofer v. Board of Education*, 89 Cal. 110, 23 Am. St. Rep. 451, 26 Pac. 646; monographic note to *La Crosse etc. R. R. Co. v. Vanderpool*, 78 Am. Dec. 696. Such a lien against a public building cannot be enforced by a sale of the property when its use is necessary to the administration of governmental affairs: *Noonan v. Hastings*, 101 Ky. 312, 72 Am. St. Rep. 419, 41 S. W. 32.

**Mechanic's Lien—Quasi Public Buildings.**—The property of an electric light corporation is subject to mechanics' liens: *Badger Lumber Co. v. Marion etc. Co.*, 48 Kan. 187, 30 Am. St. Rep. 306, 30 Pac. 117. A railroad is not subject to such liens, though its buildings may be. A stable used by a horse railroad company is subject to a mechanic's lien: See the monographic note to *La Crosse etc. R. R. Co. v. Vanderpool*, 78 Am. Dec. 698.

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**1. ABORTION—MANSLAUGHTER.**—Death of a woman caused by an abortion is manslaughter, and not murder. (*Worthington v. State*, 506.)

**2. ABORTION—MANSLAUGHTER.—INDICTMENT** for manslaughter in causing the death of a woman by means of an abortion is valid. (*Worthington v. State*, 506.)

## ACCESSARIES.

See Criminal Law, 6.

## ACTIONS.

**1. ACTIONS—CAUSE OF—DEFINITION.**—A cause of action is simply a right to enforce an "obligation," regardless of whether the action is *ex contractu* or *ex delicto*, or for compensation, or damages, or for restitution, or in *rem*, or in *personam*. The "cause of action" is to be distinguished from the "remedy," which is merely the means by which the "obligation" is effectuated, and it is also to be distinguished from the "relief" sought. (*Frost v. Witter*, 53.)

**2. ACTIONS—MALICIOUS EXERCISE OF LEGAL RIGHT.**—An act which is lawful in itself, and which violates no right, cannot be made actionable because of the motive which induced it. A malicious motive will not make that wrong which in its own essence is lawful. (*Guethler v. Altman*, 313.)

**3. ELECTION OF REMEDIES.**—A party does not make an election between inconsistent remedies unless he in fact has such remedies. Hence the institution of a fruitless action, which a party has no right to maintain, will not preclude him from asserting the rights he really possesses. (*Fuller-Warren Company v. Harter*, 867.)

**4. ELECTION OF REMEDIES—INTENT TO MAKE A CHOICE.**—The doctrine that intent to make a choice between inconsistent remedies is essential to a choice, and that absence of such intent will relieve one from the effect of the rule, applies only where action in the first instance was taken in ignorance of the facts. (*Clausen v. Head*, 933.)

**5. ELECTION—SUIT AGAINST CORPORATION OR INDIVIDUALS.**—Where one, having a right to proceed against an association as a corporation, or against the members thereof as



partners, makes an election between the two courses, with knowledge of the facts, he waives the one not chosen. (*Clausen v. Head*, 933.)

### ADULTERATION OF FOOD.

See Constitutional Law, 11-14.

### ADVERSE POSSESSION.

**ADVERSE POSSESSION.—THE POSSESSION** of one room in a house will not prevent the statute of limitations from running against the remainder of the house if it was in actual adverse possession, but such room must be identified in order to be available as a defense against the statute of limitations. (*Sanford v. Herron*, 703.)

### AGENCY.

**AGENCY.**—Authority to borrow money includes the power to execute a promissory note therefor. (*Security Sav. Bank v. Smith*, 756.)

See Power of Attorney.

### AGISTMENT.

**1. AGISTMENT—LIEN.—INDEPENDENTLY OF THE STATUTE** or special agreement, one who feeds or cares for an animal of another has no lien thereon for his charges. (*Sharp v. Johnson*, 788.)

**2. AGISTMENT—LIEN—PART OWNERSHIP.**—Under a statute giving a lien to one who feeds or cares for the stock of another, one who feeds and cares for an animal of which he is part owner is not entitled to an agistor's lien. (*Sharp v. Johnson*, 788.)

**3. AGISTMENT—LIEN—FURNISHING FEED.**—While one who feeds or cares for another's stock may be entitled to a lien for the feed and care furnished by himself, he is not entitled to a lien for feed and care furnished in part by other people, though he may have paid therefor. (*Sharp v. Johnson*, 788.)

**4. AGISTMENT—NONLIENABLE ITEMS.**—No agistor's lien can be maintained, under the Oregon statute, for freight, entrance, and jockey fees paid in handling a horse on a race circuit. (*Sharp v. Johnson*, 788.)

### APPEAL.

**1. APPELLATE PRACTICE—NOTICE OF APPEAL—PARTITION.**—In partition suits where there are several parties plaintiff or defendant and one of these appeals, notice of the appeal must be served on all the other parties interested, otherwise the supreme court cannot entertain the appeal. (*Lippold v. Lippold*, 331.)

**2. APPEAL—BILL OF EXCEPTIONS—FORM OF, NOT MATERIAL.**—A bill of exceptions is not required to be in any particular form, and is not invalid because it lacks the usual formal beginning. (*Everman v. Hyman*, 284.)

**3. APPEAL—BILL OF EXCEPTIONS—DATE OF PRESENTATION.**—A failure to state, in a bill of exceptions, the date of its presentation for the judge's signature is not material where the bill is shown to have been signed and filed within the time allowed by the court. (*Everman v. Hyman*, 284.)

**4. APPEAL — BILL OF EXCEPTIONS — INDORSEMENT.**—It is not necessary to the filing of a paper that it should be indorsed as having been so filed. It is filed when it is delivered

to the proper officer, and by him received to be kept on file. Hence, the absence of a file-mark on a bill of exceptions is not material where the clerk's certificate shows that the bill was filed. (*Everman v. Hyman*, 284.)

5. **APPEAL—BILL OF EXCEPTIONS.—A JUDGE'S CERTIFICATE** that a bill of exceptions contains all the evidence given in the cause is sufficient, though it follows the reporter's certificate that "this was all the evidence given in the cause." (*Everman v. Hyman*, 284.)

6. **APPEAL—BILL OF EXCEPTIONS—REPLEVIN.**—Where a writ of replevin has been quashed on motion, before issue is joined and without any trial, a bill of exceptions is unnecessary to review the errors upon appeal. (*Dages v. Brake*, 556.)

7. **APPELLATE PRACTICE—TRANSCRIPT—OBJECTION TO VERIFICATION OF ANSWER.**—If there is no motion to strike out the answer, and the parties go to trial on the pleadings without objection, an objection that the answer was not verified cannot be made for the first time on appeal, although the clerk's certificate to the transcript on appeal is insufficient to show that the answer was in fact verified. (*Chalmers v. Sheehy*, 62.)

8. **APPELLATE PRACTICE—ALLEGATIONS OF FRAUD—WAIVER OF OBJECTIONS.**—If there is no special demurrer to the answer in an action, in the absence of which its allegations of fraud are sufficient, and the case is tried on the assumption that the issue of fraud is properly pleaded, an objection that the allegations of fraud were not properly pleaded is waived, and cannot be urged on appeal. (*Chalmers v. Sheehy*, 62.)

9. **APPELLATE PRACTICE.**—A party cannot profit on appeal by an error into which he has led the trial court. (*Fish v. Smith*, 161.)

10. **APPELLATE PRACTICE—REFUSAL OF CONTINUANCE.** If it appears from the bill of exceptions that there was no error in refusing a continuance to the defendant, his affidavit cannot be resorted to on appeal to show otherwise. (*Frost v. Witter*, 53.)

11. **APPELLATE PRACTICE—REFUSAL OF REPORTER'S SERVICES.**—If the case is one in which a reporter's services could have been dispensed with without prejudice or inconvenience, and no reporter could be found, there is no error in refusing a motion for such services. (*Frost v. Witter*, 53.)

## ARREST.

1. **ARREST FOR FELONY—RESISTING—KILLING OFFICER.**—Where an officer, who has knowledge of a felony committed and of the one who committed it, is killed by such felon while making the arrest, the offense is murder. (*State v. Evans*, 669.)

2. **ARREST—RESISTING—REASONABLE SUSPICION OF FELONY—KILLING OFFICER.**—Where an officer arrests one for felony without a warrant upon reasonable suspicion, killing such officer, while resisting arrest or in attempting to escape, is murder in the first degree, even though no felony has been committed. (*State v. Evans*, 669.)

3. **ARREST—FRESH PURSUIT—KILLING OFFICER—NOTICE FOR WHAT ARRESTED.**—One who is apprehended on fresh pursuit cannot justify his killing of the arresting officer on the ground that he was not notified for what he was arrested, since

in such a case he is presumed to know the cause of his arrest. (State v. Evans, 669.)

4. **ARREST.—A PRIVATE PERSON MAKING AN ARREST FOR A PAST FELONY** need not give notice of the ground for the arrest, if the accused has notice aliunde. (State v. Evans, 669.)

5. **OFFICER—POWER TO ARREST.—A POLICEMAN** has the same power of making arrests as a sheriff or constable, and in so doing is entitled to the same protection. (State v. Evans, 669.)

6. **ARREST FOR FELONY WITHOUT WARRANT.—IF A PEACE OFFICER** arrests without warrant, he will be justified in so doing although no felony is actually committed, if he has reasonable cause, either on his own knowledge of facts or on facts communicated to him by others, to suspect the one apprehended. (State v. Evans, 669.)

#### ASSIGNMENTS.

See Pleading, 7.

#### ATTACHMENT AND GARNISHMENT.

1. **ATTACHMENT—GARNISHMENT—ANNUITY FOR LIFE.** An obligation for one person to pay another a certain sum of money annually, for life, is subject to garnishment by the latter's creditors. (Keiser v. Shaw, 450.)

2. **ATTACHMENT OF GOODS CONSIGNED TO ONE'S OWN ORDER.—A consignor** consigning property to his own order, with directions to notify the purchaser thereof, and sending a draft, with a bill of lading attached, requiring payment of the draft before the bill of lading is delivered, does not part with his title to the property until the draft is paid. Hence, one who attaches the property before such payment acquires a lien not defeated by a subsequent payment of the draft. (Kentucky Refining Co. v. Globe Refining Co., 468.)

3. **ATTACHMENT—UNDIVIDED INTEREST IN PERSONALTY.—A sheriff,** in attaching an undivided interest in a chattel, such as a horse, has the right to take it into custody, and is not guilty of trespass in so doing. (Sharp v. Johnson, 788.)

#### ATTORNEY AND CLIENT.

**ATTORNEY AND CLIENT—AUTHORITY TO CONSENT TO JUDGMENT.—An attorney,** under a general employment, has no authority to consent to a judgment by compromise against his client, without the latter's knowledge or consent. A judgment so rendered is void. (Kilmer v. Gallaher, 358.)

#### BAIL.

See Criminal Law, 7.

#### BAILMENT.

See Warehousemen.

#### BANKING.

**BANKING—FORGED CHECK—LIABILITY FOR.—Where** A personates B, and thereby obtains a loan of C, who draws his check for the amount thereof in favor of B, and delivers it to A, who obtains payment thereof by a forged indorsement of the



name of B, and the amount is charged against C's deposit account at the bank, he may, on discovering the facts, maintain an action against the bank for the amount thus paid and charged against his account. It is not material that the man who negotiated the loan received the check, and that it was intended to be paid him, for this intention was based on the false assumption that he was the person named in the check. The statute of Rhode Island declaring that "where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative; and no right to retain the instrument or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up forgery or want of authority," is in harmony with the rule above stated, but it is but an expression of the pre-existing common-law rule upon the subject. (*Tolman v. American Nat. Bank*, 850.)

### BASTARDS.

See *Illegitimates*.

### BENEFIT ASSOCIATIONS.

1. **BENEFIT ASSOCIATIONS—EVIDENCE.**—In an action against a benefit society the admission in evidence of a preliminary application for membership, not in the form prescribed by the charter, is harmless error if the authorized application upon which the member was admitted is afterward produced in evidence, when the issue is whether the applicant became a member of the order with intent to commit suicide in fraud thereof. (*Supreme Conclave etc. v. Miles*, -528.)

2. **BENEFIT ASSOCIATIONS—EVIDENCE.**—If, in an action against a benefit society, there is no question as to the sufficiency of proof of the death of the member, the admission in evidence of a letter by the secretary of the society to the beneficiary acknowledging the receipt of proof of the death, if error is harmless. (*Supreme Conclave etc. v. Miles*, 528.)

3. **BENEFIT ASSOCIATIONS—EVIDENCE OF INTENT OF MEMBER TO COMMIT SUICIDE.**—If, in an action against a benefit society to recover a death benefit, the defendant offers evidence to show that the deceased joined the society with intent to defraud it by committing suicide, the plaintiff may show in rebuttal, by a witness who had an opportunity to observe the deceased the day before he killed himself, that the suicidal purpose had overtaken him after his joining the society. (*Supreme Conclave etc. v. Miles*, 528.)

### BICYCLES.

See *Highways*.

### BILLS AND NOTES.

See *Negotiable Instruments*.

### BILLS OF LADING.

See *Carriers*.

## BUILDING AND LOAN ASSOCIATIONS.

**1. BUILDING AND LOAN ASSOCIATIONS—CAPACITY OF, TO ENFORCE CONTRACTS—ESTOPPEL TO DENY.**—Those who have borrowed money from a building and loan association, accepted its stock, and dealt with it in its corporate capacity, are estopped to deny the capacity of the association to enforce its contracts, on the ground of defective organization, where it has apparently attempted, in good faith, to comply with the law governing its organization. (*Washington Investment Assn. v. Stanley*, 793.)

**2. BUILDING AND LOAN ASSOCIATIONS—FOREIGN CORPORATION—AUTHORITY TO DO BUSINESS—EVIDENCE OF.** A foreign building and loan association has prima facie authority to do business in this state, where it holds a certificate from the secretary of state, certifying that it has complied with the requirements of the law entitling it to do business in this state. (*Washington Investment Assn. v. Stanley*, 793.)

**3. BUILDING AND LOAN ASSOCIATIONS—RATE OF PREMIUMS—RATE OF INTEREST—DISTINCTION—USURY.**—In a statute concerning building and loan associations, which provides that their by-laws shall fix the amount of premium on loans and the rate of interest thereon; that the provisions of such statute relating to bidding on loans shall not apply to those associations which fix in their by-laws the rate of interest and premium on loans; and that no premium taken by any association governed by the act shall be treated as interest, or render the association amenable to the laws of usury, the "rate of premium" on loans is not the same thing as the rate of interest thereon, but signifies a definite or fixed sum or amount agreed upon between the association and the borrower as a consideration upon which the loan or advancement is made; and a premium fixed by a rate per cent upon the amount of the loan, and dependent as to the time of its payment upon the time that the loan may remain unpaid, is not the definite or fixed sum contemplated by building and loan associations as a premium, but is a mere device to avoid the law of usury. (*Washington Investment Assn. v. Stanley*, 793.)

**4. BUILDING AND LOAN ASSOCIATIONS—LOAN TO BORROWING MEMBER—WHEN USURIOUS.**—If the owner of stock in a building and loan association borrows money of it, agreeing to pay a given rate of interest on the loan, and a "premium" at a stated per cent per annum on the face of the loan, payable during the life of the contract, such contract is usurious if the "premium" and the interest together exceed the lawful rate of interest on money. (*Washington Investment Assn. v. Stanley*, 793.)

**5. A FOREIGN BUILDING AND LOAN ASSOCIATION HAS DONE BUSINESS IN THIS STATE**, within the meaning of a statute prescribing conditions under which it may "do business" here, where it has loaned money in this state, through a local agent, has taken a note therefor, secured by a mortgage on land here, and has brought suit on the contract in the courts of this state. (*Washington Investment Assn. v. Stanley*, 793.)

**6. BUILDING AND LOAN ASSOCIATION—CONFLICT OF LAWS—CONTRACT OF THIS STATE—WHAT IS.**—A loan made in this state to a citizen thereof, by a foreign building and loan association, doing business here, which is secured by a mortgage upon land here, is a contract of this state, and must be construed and enforced according to its laws, notwithstanding a stipulation in the mortgage to the effect that it is a contract of another state. (*Washington Investment Assn. v. Stanley*, 793.)

**CARRIERS.**

1. **CARRIERS—BILL OF LADING—CONTRACT OF CARRIAGE.**—A bill of lading is not essential to charge the carrier with the duty of safely transporting the property delivered for carriage, but the doing of the several acts entitling the shipper to a bill of lading is necessary to charge the carrier with the safety of the articles intrusted to him. (*Tate v. Yazoo etc. R. R. Co.*, 649.)

2. **CARRIERS—DELIVERY OF GOODS.**—The mere loading of cotton by a shipper on a car set out at a siding, as is customary, where the carrier has no station or agent, and neither it or its agent has any knowledge that the car is loaded ready for shipment is not such a delivery to the carrier as makes it liable for the loss of the cotton by fire several hours before the arrival of the train which in the regular course of business would have transported it to its destination. (*Tate v. Yazoo etc. R. R. Co.*, 649.)

3. **CARRIERS—LIABILITY—DELIVERY OF GOODS.**—Unless bound by contract, a carrier is not responsible for the safety of articles intended for shipment until a delivery of them to him and an acceptance thereof, and there can be no acceptance until he has knowledge of their readiness for transportation and the shipper's desire therefor. (*Tate v. Yazoo etc. R. R. Co.*, 649.)

**CERTIFICATE OF DEPOSIT.**

See Limitation of Actions, 1-3.

**CONSPIRACY.**

**CONSPIRACY — EVIDENCE. — THE DECLARATIONS OF ONE CONSPIRATOR,** made before the conspiracy was ended, are admissible in evidence and binding upon all the other conspirators, although the one making them is not indicted and tried with the others. (*Slaughter v. State*, 242.)

**CONSTITUTIONAL LAW.**

1. **CONSTITUTIONAL LAW—BURDEN OF PROOF.**—It is for those who question the constitutionality of a statute to show that it is either expressly or impliedly forbidden by the constitution. (*Sinking Fund Commrs. v. George*, 454.)

2. **CONSTITUTIONAL LAW—APPOINTMENT TO OFFICE—NATURE OF FUNCTION OF.**—The selection of a board of penitentiary commissioners for a state is not essentially an executive function. Hence, a statute creating such a board, and conferring upon the legislature the duty of appointing the commissioners, whose duties are defined by the act, is not unconstitutional. (*Sinking Fund Commrs. v. George*, 454.)

3. **CONSTITUTIONALITY OF LAW—LEGISLATIVE ELECTION OF OFFICERS.**—A statute which authorizes the legislature, independent of the governor's voice, to elect a board of penitentiary commissioners, does not require separate action by the two houses; nor is it necessary that a resolution for joint action should be approved by the governor. If the commissioners receive a majority of the votes of both houses and of each house, they are elected. (*Sinking Fund Commrs. v. George*, 454.)

4. **CONSTITUTIONALITY OF LAW — STATUTES, WHEN GOOD IN PART AND BAD IN PART.**—If the unconstitutional portion of an act can be stricken out, leaving that which remains complete in itself, and capable of being executed in accordance with the



apparent legislative intent, wholly independent of that which is rejected, it must be sustained. (*Sinking Fund Commrs. v. George*, 454.)

5. **CONSTITUTIONAL LAW—STATUTES AS TO TERMS OF OFFICE—WHEN GOOD IN PART.**—When the legislature, in creating offices, is limited to a term not exceeding four years, it violates the constitution by creating a six year term; but where an act provides that three members of the board of police commissioners are to be elected, one for the term of two years, one for four years, and one for six years, that part of the act which adds two years to the constitutional term of four years may be rejected without invalidating the remainder of the act, and there will be three commissioners, one of whom holds for a term of two years, and two hold for a term of four years each. (*Sinking Fund Commrs. v. George*, 454.)

6. **CONSTITUTIONAL LAW—PUBLICATIONS.**—There is no constitutional right to publish every fact or statement simply because it is true. (*State v. McKee*, 124.)

7. **CONSTITUTIONAL LAW.—THE POWER OF THE STATE TO PUNISH ACTS AS INJURIOUS TO PUBLIC HEALTH, safety, or morals,** is not limited to acts within the adjudicated scope of the common-law offenses of nuisance and libel. (*State v. McKee*, 124.)

8. **CONSTITUTIONAL LAW.—It is the duty of courts to give effect to a legitimate legislative purpose plainly indicated, if it can reasonably be done, and not to construe language so as to invalidate a statute when fairly susceptible of a construction consistent with its validity.** (*State v. McKee*, 124.)

9. **CONSTITUTIONAL LAW—LIBERTY OF PRESS.**—A statute making it a penal offense to sell, or offer to sell, land, or give a publication principally made up of criminal news, police reports, and pictures and stories of bloodshed, lust and crime, does not violate constitutional guaranties that every person may freely speak, write, and publish his sentiments on all subjects, and that no law shall be passed to restrain the liberty of speech or of the press. (*State v. McKee*, 124.)

10. **CONSTITUTIONAL LAW.—THE VALIDITY OF STATUTES IS A QUESTION OF LAW** for the court, and the jury is bound to accept its opinion as the law for the case. (*State v. McKee*, 124.)

11. **CONSTITUTIONAL LAW—ADULTERATION OF MILK.** A statute imposing a penalty for selling adulterated milk, and declaring adulteration to be the "addition of water or any other substance or thing" to milk, is not unconstitutional as invading the province of the judiciary to construe statutes. (*State v. Schlenker*, 360.)

12. **CONSTITUTIONAL LAW—STATUTE CONTAINING DEFINITION.**—The legislature has power to prescribe legal definitions of its own language. When an act passed by it embodies a definition, it is binding on the courts. (*State v. Schlenker*, 360.)

13. **CONSTITUTIONAL LAW—POLICE POWER—ADULTERATION.**—It is within the police power of the state to prohibit the sale of adulterated milk, and it is immaterial whether the foreign adulterating matter is or is not injurious to health, or whether there is or is not fraud in the sale. (*State v. Schlenker*, 360.)

14. **CONSTITUTIONAL LAW—POLICE POWER.**—The fourteenth amendment to the constitution of the United States does not impose any restraint on the exercise of the police power of the state. (*State v. Schlenker*, 360.)

**15. CONSTITUTIONAL LAW—POLICE POWER—FISHWAYS.**

The state, in the exercise of its police power, has the right to compel the construction of fishways over dams across navigable, as well as unnavigable, streams, so long as intercommunication between the states is not thereby affected. (*State v. Meek*, 342.)

**16. CONSTITUTIONAL LAW—POLICE POWER—FISHWAYS.**

The power of the state to compel a fishway to be made in a dam across a stream is not lost merely because the state itself made such dam without any fishway in it, and conveyed it in that condition without expressly reserving the right to thereafter exercise police power over it. In such case the exercise of the power to compel the construction of such fishway is not an impairment of the contract of sale of the dam. (*State v. Meek*, 342.)

**17. CONSTITUTIONAL LAW—POLICE POWER, EXERCISE**

**OF, WHEN NOT SUSTAINABLE.**—When the validity of a statute is assailed and it is attempted to be sustained as an exercise of the police power, it is always open to the court to consider whether the act bears any reasonable relation to the public purpose sought to be accomplished. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, nor impose unusual or unnecessary restrictions upon lawful occupations. (*State v. Dalton*, 818.)

**18. CONSTITUTIONAL LAW.—IT IS ALWAYS TO BE PRE-**

**SUMED** that all statutes are passed in the utmost good faith, and are conformable to the constitution, and it is not until the unconstitutionality of an act is plainly made to appear that the court is called upon to declare it void. (*State v. Dalton*, 818.)

**19. CONSTITUTIONAL LAW—INTERFERENCE WITH LAW-**

**FUL BUSINESS.**—A STATUTE forbidding any person to sell, give away, or distribute any stamp, coupon, or other device which will enable a purchaser of property to demand or receive from another person any article of merchandise other than that actually sold to such purchaser, and further prohibiting any person other than a vendor from delivering to any person any article of merchandise other than that actually sold upon the presentation of any such stamp, coupon, or other device, violates the fourteenth amendment to the constitution of the United States and also section 10 of article 1 of the constitution of Rhode Island declaring that in all criminal prosecutions the accused shall not be deprived of life, liberty, or property unless by the law of the land. (*State v. Dalton*, 818.)

**20. CONSTITUTIONAL LAW—THE TERM "LIBERTY," as**

employed in the fourteenth amendment of the constitution of the United States, and in section 10 of article 1 of the constitution of Rhode Island, is not restricted to freedom from physical restraint, but embraces the right of each individual to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. This inalienable right is trespassed upon and impaired whenever the legislature prohibits one from carrying on his business in his own way, provided that business and the mode of carrying it on are not injurious to the public, and the business is not one affected with a public interest. (*State v. Dalton*, 818.)

**21. CONSTITUTIONAL LAW.—TO WARRANT THE STATE**

**IN ABSOLUTELY PROHIBITING A BUSINESS,** it is not sufficient that it is conducted by methods which do not meet general approval. There must be something in the methods employed which render it injurious to the public by demoralizing legitimate business, by introducing the element of chance, or by cheating and

defrauding purchasers and others. It is not enough that it seriously interferes with, and even destroys, the business of others. (*State v. Dalton*, 818.)

22. **CONSTITUTIONAL LAW.—THE GIVING OF A PREMIUM BY A VENDOR OF PROPERTY** to purchasers as an inducement for them to trade with him is a legitimate method of doing business which the state has not the power to prohibit. (*State v. Dalton*, 818.)

23. **CONSTITUTIONAL LAW—ACT DEPRIVING HUSBAND OF RIGHT IN WIFE'S LAND.**—A statute giving to a husband a right to the use of his wife's land, with power to rent it for not more than three years at a time and to receive the rent, and which was in force at the time of the marriage and the acquisition of the property, vests in him a statutory right, of which the legislature has no power to divest him by a subsequent married woman's act. (*Rose v. Rose*, 430.)

24. **STATUTES—CURATIVE ACT AS TO STREET GRADE.** A statute declaring the approach to a bridge, in a city, to be the established grade of a certain street, so far as occupied thereby, cures irregularities in the original appropriation of the street to such purpose, though passed after the decision of the trial court in a suit to enjoin the continuance of the approach. (*Brand v. Multnomah County*, 772.)

25. **CONSTITUTIONAL LAW—CURING UNCONSTITUTIONAL LAW.**—If public officers, acting under a statute afterward declared unconstitutional, offer bounties for animal scalps and issue county warrants in payment therefor, a subsequent statute legalizing such warrants and declaring them to be county charges and payable out of general county funds, is void as being an encroachment of legislative upon judicial power. (*Felix v. Board of County Commrs.*, 424.)

### CONTRACTS.

1. **CONTRACT—LEX LOCI.**—The law of the place where a contract is to be performed is the law of the contract. (*Smoot v. Judd*, 738.)

2. **CONTRACT OF EMPLOYMENT—STATUTE OF FRAUDS.** Since a contract to employ another may be performed within a year, it need not be in writing to satisfy the statute of frauds. (*Sax v. Detroit etc. Ry. Co.*, 572.)

3. **CONTRACT TO EMPLOY — CONSIDERATION—MUTUAL PROMISES.**—Where one agrees to release a former employer from liability for injuries while in his employ in consideration of a promise of re-employment, the execution of the release and the promise to re-employ are mutual and binding promises. (*Sax v. Detroit etc. Ry. Co.*, 572.)

4. **CONTRACT TO EMPLOY—SATISFACTION—DISCHARGE—REASONS.**—Where one has been discharged by reason of dissatisfaction with service under a contract to perform duties to the entire satisfaction of the employer, the reasons for, or the justice of, the employer's dissatisfaction cannot be inquired into. (*Sax v. Detroit etc. Ry. Co.*, 572.)

5. **CONTRACT TO EMPLOY—BREACH OF—SATISFACTION.** Where one, who has been employed so long as his services are satisfactory, is laid off for some reason other than a dissatisfaction with his service, a failure to employ him thereafter constitutes a breach of the contract. (*Sax v. Detroit etc. Ry. Co.*, 572.)

6. **CONTRACT TO EMPLOY—BREACH—DAMAGES—MORTALITY TABLES.**—In an action by one for the breach of a contract



to employ him so long as his services were satisfactory, mortality tables cannot be introduced as bearing on the expectancy of life, in connection with the question of damages. (*Sax v. Detroit etc. Ry. Co.*, 572.)

**7. CONTRACTS—RESTRAINT OF TRADE—MONOPOLY.**—A contract in the form of a lease, whereby one manufacturer agrees with another engaged in the same business not to manufacture certain articles during a specified period, is void as against public policy. (*Clark v. Needham*, 559.)

**8. CONTRACTS—GENERAL RESTRAINT OF TRADE—MONOPOLY.**—A contract whereby one agrees to close part of his business for the benefit of a rival is void as tending to create a monopoly, although limited as to time and subject matter. (*Clark v. Needham*, 559.)

### CONVERSION.

See *Trover and Conversion*.

### CORPORATIONS.

**1. CORPORATIONS—FRANCHISES.**—Corporate franchises are of three classes: 1. The right to organize and exist; 2. The right to act generally; and 3. The special privileges which are not possessed by individuals under general laws. (*Detroit etc. Ry. Co. v. Common Council*, 589.)

**2. CORPORATIONS — SPECIAL LAWS — LEGISLATIVE POWER.**—While private corporations can be created under general laws only, the legislature may grant privileges to them by special laws in any case that it might do the same to individuals. (*Detroit etc. Ry. Co. v. Common Council*, 589.)

**3. CORPORATIONS—STOCKHOLDERS' RIGHT TO INTERVENE.**—Corporation stockholders are entitled to defend legal proceedings in behalf of their corporation, if its directors or managing agents are willfully or fraudulently neglectful of its interests. The proper practice, in such case, is for the stockholders to move the court for leave to intervene in the suit they wish to defend, and to allege, and make a prima facie showing, that the authorized and managing agents of the corporation are derelict in their duties, and that they have a meritorious defense to the action. (*Fitzwater v. National Bank*, 377.)

**4. CORPORATIONS, FOREIGN—JURISDICTION OF—SERVICE UPON.**—A loan corporation organized in one state, which makes its securities payable in another at a designated agency therein, and pays them there, appointing a trustee resident thereof to receive and hold such securities in trust for the payment of its obligations made payable there, and depositing its securities with the trustee for such purpose, is doing business in that state, and is subject to the jurisdiction of its courts by service of summons on its president or other managing agent casually found within such state. (*J. B. Watkins Land etc. Co. v. Elliott*, 385.)

**5. CORPORATIONS—FOREIGN—CONFLICT OF LAWS.**—A citizen of one state who becomes a shareholder in a corporation created under the laws of another state enters into contract relations, the extent and obligation of which depend largely upon the laws of the latter state. If his shares have not been fully paid up, his obligation to respond to calls made by the corporation binds him also to respond to calls which the corporation ought to have made, but which, by reason of its default in that respect, have been otherwise made in conformity with the laws regulating its affairs. (*Fish v. Smith*, 161.)

**6. CORPORATIONS — FOREIGN — LIABILITY OF STOCKHOLDERS.**—If the laws of the state wherein a corporation is formed provide for the winding up of insolvent corporations through the agency of a receiver, and empower its courts to call in unpaid stock, and make it payable to such receiver, the latter becomes the statutory successor of the corporation, and as such may sue a stockholder in another state where he resides to recover the balance unpaid on his capital stock. (*Fish v. Smith*, 161.)

**7. CORPORATIONS — FOREIGN — LIABILITY OF STOCKHOLDERS.**—A stockholder in a corporation against which suit is brought by a creditor to establish its insolvency, and praying for the appointment of a receiver, is a party to the action by representation through the corporation up to the date of the interlocutory judgment appointing a receiver, and he cannot collaterally attack such appointment. Such judgment is conclusive of the necessity of collecting unpaid capital stock to pay corporate debts in an action brought by such receiver or his assignee against a delinquent stockholder in another state. (*Fish v. Smith*, 161.)

**8. CORPORATIONS — FOREIGN — LIABILITY OF STOCKHOLDERS—RECEIVERSHIP—RES JUDICATA.**—The right of a receiver under the statute of the state of his appointment to sell the assets of an insolvent corporation of that state, including his own claim, to himself as trustee for creditors is for the determination of the court in the receiver suit. Its judgment unappealed from is conclusive upon the courts of another state in a suit therein to recover unpaid stock subscriptions from shareholders who were parties by representation to the receivership proceedings. (*Fish v. Smith*, 161.)

**9. CORPORATIONS — ASSETS — LIABILITY OF STOCKHOLDERS.**—The liability of a stockholder in a corporation to respond to calls upon unpaid stock is an asset which the receiver for such corporation may sell and the purchaser may sue for. (*Fish v. Smith*, 161.)

**10. EVIDENCE.—STOCK-BOOKS OF CORPORATIONS** are not admissible in its favor to prove that a certain person is a stockholder when this question is in issue. (*Fish v. Smith*, 161.)

**11. CORPORATIONS — STOCK-BOOKS AS EVIDENCE.**—If the relation of shareholder has otherwise been shown to exist, the books of a corporation become admissible to aid in determining when it commenced and what, if anything, has been paid in upon the shares. (*Fish v. Smith*, 161.)

**12. CORPORATIONS—STOCK-BOOKS AS EVIDENCE.**—Stockholders in moneyed corporations, by their contract of membership, constitute it their agent to keep such stock-books as are usually kept by such organizations, and entries therein made in the due course of business are admissible against them, though not conclusive. (*Fish v. Smith*, 161.)

**13. EVIDENCE—CERTIFICATE OF CORPORATE ORGANIZATION.**—A certificate by a public officer of another state as to the legal organization of a corporation therein is a mere narrative of a past event and of its legal effect, and inadmissible in the courts of a state other than the one in which the corporation is organized. (*Fish v. Smith*, 161.)

**14. CORPORATIONS.—STATEMENTS ON THE MARGIN OF STOCK CERTIFICATES,** showing the amount of the capital stock, the number of shares, and the par value of each, are as much a part of such certificates as if they were embodied in the printed portion thereof. (*Fish v. Smith*, 161.)

**15. CORPORATIONS — STOCKHOLDERS — ESTOPPEL TO DENY CORPORATE ORGANIZATION.**—A stockholder who has received dividends on his stock with knowledge that it is not fully paid up is estopped to deny that the corporation was legally organized when it becomes insolvent, and he is sued for the balance due on his stock. (*Fish v. Smith*, 161.)

**16. CORPORATIONS BY ESTOPPEL.**—Where one deals with an association as a corporation, such dealing, by estoppel, as to such transaction, fixes the status of the company to be what it was represented and recognized to be therein. (*Clausen v. Head*, 933.)

### COSTS.

**COSTS—DISCRETION OF JUDGE.**—IN EQUITY the question as to which party shall pay the costs rests in the discretion of the judge, and this discretion will not be interfered with where it has not been abused. (*Guernsey v. Phinzy*, 270.)

### COTENANCY.

See Deeds, 4; Replevin.

### COVENANTS.

**1. COVENANTS—WARRANTY OF TITLE.**—A covenant of warranty of title does not protect the grantee against adverse claims or suits for which the grantor is not responsible, but only against claims or suits based on a legal foundation, and if a suit by an adverse claimant is groundless, and results in favor of the title warranted, the purchaser is not entitled to recover from the grantor for costs and expenses incurred in defending the suit. (*Thorne v. Clark*, 356.)

**2. COVENANTS OF WARRANTY OF TITLE** do not run against apparent but unfounded titles in the land, but only against hostile titles in fact superior to that of the grantor. Hence, the grantee cannot recover of his grantor the expense of removing an apparent but unfounded cloud upon his title. (*Thorne v. Clark*, 356.)

### CRIMINAL LAW.

**1. CRIMINAL LAW—PROOF OF INTENT.**—If a criminal intent is not an essential element of an offense described in the statute, it need not be shown in order to justify a conviction. (*State v. Schlenker*, 360.)

**2. CRIMINAL LAW—INSTRUCTIONS.**—A charge given by the court containing declarations which have been held unsound by the supreme court in another case is ground for the reversal of a judgment of conviction. (*People v. Botkin*, 39.)

**3. CRIMINAL LAW—SENDING POISON BY MAIL—DEATH IN ANOTHER STATE—VENUE OF CRIME.**—Under a statute providing that all persons who commit, in whole or in part, any crime within the state are liable to punishment under the laws thereof, one who, within the state, mails poison with intent to take the life of a person in another state, is, if such person received and took such poison and died therefrom, guilty of murder committed, in part, in the state from which the poison was sent, and is punishable under the law of that state, as if the crime were committed entirely therein. (*People v. Botkin*, 39.)

**4. CRIMINAL LAW—SALE OF PROHIBITED ARTICLES—AUTHORITY TO SERVANT TO SELL.**—In statutory offenses



consisting in the sale of articles in violation of regulations for securing public order, the authority to a servant to sell the particular article charged as sold by the master may, without proof of any specific authority, be inferred from various circumstances, such as the relation of shopkeeper and selling clerk, coupled with proof that the article sold was placed by the master in the shop among other things that were to be sold; carelessness or negligence of the master in providing or keeping the articles sold, and other evidence legally tending to prove that the sale was made with the knowledge and consent of the master, provided such evidence does in fact satisfy the jury beyond a reasonable doubt that the servant in selling the article acted in pursuance of authority from the master. (*State v. McKee*, 124.)

5. **CRIMINAL LAW—IMMORAL PUBLICATION.**—In a prosecution for selling a paper devoted to immoral matter, the question whether the matter published therein comes within the statutory prohibition is for the court to determine, when the sale and the fact that the paper was devoted to the publication of the class of matter contained therein are admitted. (*State v. McKee*, 124.)

6. **MISDEMEANORS—PRINCIPAL AND ACCESSARY.**—In misdemeanors there are no accessories before the fact nor principals in the second degree, but all are principals. (*Slaughter v. State*, 242.)

7. **CRIMINAL RECOGNIZANCES—DEFENSE TO.**—Since an indictment which charges the principal in a criminal recognizance with no offense against the state amounts to no indictment, the sureties may set up its invalidity in defense to a scire facias to forfeit the recognizance. (*Candler v. Kirksey*, 247.)

#### CURATIVE STATUTES.

See Constitutional Law, 24, 25.

#### DAMAGES.

1. **DAMAGES—INJURY TO BUSINESS THROUGH PERSUASION NOT TO PATRONIZE IT.**—A dealer in confectioneries and school supplies has no right of action for damages against a school teacher for maliciously advising or persuading his pupils not to patronize the plaintiff's store. (*Guethler v. Altman*, 313.)

2. **NEGLIGENCE—DEATH BY WRONGFUL ACT—MEASURE OF DAMAGES—EVIDENCE.**—Under a statute giving the right to recover for a death caused by wrongful act, the mere fact that the death was instantaneous, and that the loss of life was without pain or suffering, does not of itself prevent the recovery of substantial damages by the administrator or executor of the deceased. The measure of damages in such cases is the loss of earning capacity resulting to the decedent himself, and, as a consequence, to his estate. As relevant upon that question, evidence of his age and the general state of his health at the time of his death is admissible. (*Broughel v. Southern Tel. Co.*, 176.)

#### DEATH.

See Damages, 2.

#### DEEDS.

1. **DEEDS—DELIVERY—RETENTION BY GRANTOR.**—If a grantor, with the assent of the grantee, delivers his deed to a third

person to be delivered by him to the grantee upon the death of the grantor, and it is so delivered, it is effective to pass title, if it was the intention of the grantor that it should become operative at once, but postponing the time of enjoyment until his death, although he retains power to recall the instrument during his life. (*Lippold v. Lippold*, 331.)

2. **DEED OF INCOMPETENT PERSON — AVOIDANCE.**—PRIVIES IN BLOOD AND LEGAL REPRESENTATIVES are the only persons who can avoid the deed of an insane grantor. (*Hunt v. Rabitoay*, 563.)

3. **DEEDS—AMBIGUITY IN DESCRIPTION.**—A deed conveying a specific parcel of land out of a larger tract is void if, because of a patent ambiguity in the description, the location of the tract granted cannot be certainly ascertained. (*Hodge v. Bennett*, 652.)

4. **DEEDS CREATING COTENANCY — DESCRIPTION.**—A conveyance of a definite number of acres or any other definite quantity of land, parcel of a larger tract, if the amount conveyed is not located by the deed, conveys an undivided interest in the larger tract, and vests the grantee with title thereto as tenant in common in the whole in the proportion that the smaller bears to the larger tract. (*Hodge v. Bennett*, 652.)

5. **DEED TO PERSON NOT IN BEING.**—A deed to an immediate estate in land made to a person not in esse is absolutely void. (*Davis v. Hollingsworth*, 233.)

6. **DEEDS—ESTATE-TAIL—FEE.**—A deed to a woman and her children, she having no children at the time, creates an express estate tail, and under the statutes of Georgia invests her with the absolute fee. (*Davis v. Hollingsworth*, 233.)

7. **DEEDS—LIMITING ESTATE GRANTED.**—THE HABENDUM of a deed may limit or qualify the estate named in the granting clause, to accord with the intention of the parties. (*Davis v. Hollingsworth*, 233.)

8. **DEEDS—FEE LIMITED UPON A FEE.**—Under the statutes of Georgia, it is competent to limit a fee upon a fee. (*Davis v. Hollingsworth*, 233.)

9. **DEEDS—QUALIFIED FEE.**—A deed to a woman and her children, she having no children at the time, and if she should die without leaving a child or children the land to revert to the donor or his heirs, conveys a qualified fee, subject to be divested upon the donee's death without leaving a child living at her death, or to become absolute upon her dying and leaving a child in life. (*Davis v. Hollingsworth*, 233.)

See Covenants.

## DIVORCE.

See Marriage and Divorce.

## DOMICILE.

**DOMICILE—PROPERTY RIGHTS.**—The law of the domicile governs the ownership and right to personal property. (*McGrew v. Mutual Life Ins. Co.*, 20.)

## EJECTMENT.

1. **EJECTMENT—TENANTS AFTER JUDGMENT.**—Tenants of a defendant in ejectment are, after judgment for the plaintiff, estopped from turning over the possession to the grantee of their landlord. (*Sanford v. Herron*, 703.)

**2. EJECTMENT—JUDGMENT—STATUTE OF LIMITATIONS.**

A valid subsisting judgment in ejectment against one in possession, and claiming adversely, interrupted the peaceful possession of the defendant and suspended the running of the statute in his favor. (*Sanford v. Herron*, 703.)

**3. EJECTMENT—STATUTE OF LIMITATIONS—WRIT OF RESTITUTION.**—In order to suspend the statute of limitations as against a plaintiff in ejectment, it is not necessary that a writ of restitution should issue, or that the plaintiff should take possession under his judgment. (*Sanford v. Herron*, 703.)

**4. EJECTMENT—JUDGMENT—RES JUDICATA.**—A judgment in ejectment is *res judicata* as to the parties thereto and the matter adjudicated upon, until set aside or reversed, or its legal effect destroyed by the result of another action of ejectment for the same land by the parties or their heirs who were defendants therein. (*Sanford v. Herron*, 703.)

**ELECTION OF REMEDIES.**

See Actions, 3-5.

**EMBEZZLEMENT.**

**1. EMBEZZLEMENT—AGENT OF INSURANCE COMPANY—WHO IS NOT.**—Although a state agent of an insurance company permits and authorizes a person to write a particular risk, under a special contract, such person is not "an agent or servant" of the company, within the meaning of a statute prescribing a punishment for embezzlement, where the company knows nothing of him beyond seeing his name on the application as solicitor. (*Stone v. Commonwealth*, 452.)

**2. EMBEZZLEMENT—PART OF MONEY DUE AS A COMMISSION.**—A person who receives money, a portion of which belongs to himself as a commission on the whole amount, is not guilty of embezzlement, though he converts the whole to his own use. (*Stone v. Commonwealth*, 452.)

**EMINENT DOMAIN.**

**1. EMINENT DOMAIN.—INJURY WHICH ARISES FROM ESTABLISHING OR CHANGING A STREET GRADE IS NOT A "TAKING" OF PROPERTY** within the meaning of a constitutional inhibition that private property shall not be taken for public use without compensation. (*Brand v. Multnomah County*, 772.)

**2. EMINENT DOMAIN.—JUDGMENT CREDITORS ARE NOT OWNERS** within the meaning of statutes relating to condemnation proceedings. (*Williams v. Hutchinson etc. Ry. Co.*, 408.)

**3. EMINENT DOMAIN—JUDGMENT LIENS.**—A judgment is a statutory lien only. It is within the power of the legislature to modify or abolish such lien before rights become vested under it. It may be superseded by statute authorizing the taking of the land under condemnation proceedings, on payment of compensation to its owner, and when the proceedings are completed and the compensation paid an easement is acquired free of all judgment liens. (*Williams v. Hutchinson etc. Ry. Co.*, 408.)

**4. EMINENT DOMAIN—WAIVER OF PREPAYMENT OF COMPENSATION—ESTOPPEL.**—If prepayment of compensation for property taken under condemnation proceedings is waived by the owner of the land, and a railway company, relying upon such waiver, proceeds to build its road and expends large sums of money



on such land, the owner thereof is estopped to reclaim the land or maintain ejectment therefor. (*Williams v. Hutchinson etc. Ry. Co.*, 408.)

5. **EMINENT DOMAIN—RAILROADS—COLLATERAL PROCEEDING.**—The right of a railroad, regularly incorporated under the laws of a state, to exercise the power of eminent domain, cannot be inquired into and taken away in a collateral proceeding. (*Kansas etc. Ry. v. Northwestern etc. Co.*, 717.)

6. **EMINENT DOMAIN—PUBLIC RAILROAD.**—A railroad regularly incorporated under the laws of a state is a public, and not a private, corporation, and may exercise the power of eminent domain, although its officers and stockholders are the same as those of a business corporation from which it has borrowed money. (*Kansas etc. Ry. v. Northwestern etc. Co.*, 717.)

7. **EMINENT DOMAIN—RAILROAD A PUBLIC USE.**—The condemnation of land for the purpose of constructing and operating thereon a railroad is, in its very nature, the taking of land solely for a public use. (*Kansas etc. Ry. v. Northwestern etc. Co.*, 717.)

8. **EMINENT DOMAIN—RAILROADS—PUBLIC USE—VOLUME OF BUSINESS.**—The condemnation of land for railroad purposes is a public use, whatever may be the length of the road or the volume of business likely to be done. (*Kansas etc. Ry. v. Northwestern etc. Co.*, 717.)

9. **EMINENT DOMAIN—RAILROADS—OTHER REMEDIES.** The fact that a statute gives to a private business concern the right to reach a neighboring railway by means of a switch or a tramway, is not an exclusive remedy, and will not take away the right of eminent domain from a regularly incorporated railway company. (*Kansas etc. Ry. v. Northwestern etc. Co.*, 717.)

10. **EMINENT DOMAIN—RAILROADS—NECESSITY FOR LOCATION.**—The power of eminent domain conferred upon railroad companies gives them the privilege of selecting whatever location they prefer, and the exercise of this power cannot be denied because some other location may be as good or better. (*Kansas etc. Ry. v. Northwestern etc. Co.*, 717.)

11. **EMINENT DOMAIN—LAND SUBJECT TO—DEFENSE.** The fact that land sought to be condemned for a public use is held, owned, and used by a corporation organized for private gain is no defense to the right of condemnation. (*Kansas etc. Ry. v. Northwestern etc. Co.*, 717.)

12. **EMINENT DOMAIN.—PROPERTY ALREADY DEVOTED TO A PUBLIC USE** may be acquired under the power of eminent domain, provided it is not taken from one corporation by another to be used for the same purpose and in the same manner that it was used by the corporation that first appropriated it. (*Kansas etc. Ry. v. Northwestern etc. Co.*, 717.)

13. **EMINENT DOMAIN—CONSTITUTIONAL LAW.**—The legislature cannot exempt from condemnation property owned by a corporation, and make subject to condemnation the same class of property if owned by an individual. (*Kansas etc. Ry. v. Northwestern etc. Co.*, 717.)

14. **EMINENT DOMAIN—FUTURE CONDITIONS.**—In condemnation proceedings courts must deal with conditions as they exist at the time the condemnation is asked, and cannot take into account conditions that may arise thereafter. (*Kansas etc. Ry. v. Northwestern etc. Co.*, 717.)

## ESTATES.

1. **LIFE TENANT—HOSTILE CLAIMS.**—A life tenant or one claiming under him cannot purchase hostile claims against the original title and set them up during the continuance of the life estate. (*Hunt v. Rabitoay*, 563.)

2. **REMAINDER—HOSTILE CLAIMS.**—One claiming under a life tenant can purchase outstanding titles to set up against the title of the remainderman upon the termination of the life tenancy. (*Hunt v. Rabitoay*, 563.)

See Deeds, 6-9.

## ESTATES OF DECEDENTS.

1. **ESTATES OF DECEDENTS—TITLE TO.—THE ALLOWANCE OF CLAIMS** against an estate conveys no title to the land which may be sold to pay debts. (*Hunt v. Rabitoay*, 563.)

2. **ESTATES OF DECEDENTS—FUNERAL EXPENSES, WHO MAY INCUR OR CONTROL.**—If a decedent leaves no widow or children and no other relatives inclined to take upon themselves the duty of making the necessary arrangements for his funeral, it becomes the duty of his sister in law, who had been his housekeeper until his death, and has thereby been left in charge of his body, to make such arrangements as are necessary for its decent burial, and she has authority to charge his estate with the expense of articles ordered by her and in fact used at his funeral and suitable to his rank and circumstances and not disproportionate to the condition of his estate. (*O'Reilly v. Kelly*, 833.)

3. **ESTATES OF DECEDENTS—FUNERAL EXPENSES, WHAT MAY INCLUDE.—THE OBTAINING OF FLOWERS** for the funeral of a decedent, while not a necessity, is certainly appropriate and in harmony with the usual feelings and sentiments of our common humanity, and gives rise to a valid charge against his estate. (*O'Reilly v. Kelly*, 833.)

4. **ESTATES OF DECEDENTS—FUNERAL EXPENSES, WHAT CHARGEABLE AS, AND WHO MAY IMPOSE LIABILITY FOR.**—It is the duty of an executor or administrator to bury the decedent in a manner suitable to the estate he leaves behind him. If this duty, in the absence or neglect of the executor, is performed by another, not officiously but under the necessity of the case, the law implies a promise to reimburse him for the reasonable expenses incurred and paid. What expenses may properly be incurred in such circumstances depends largely upon the custom of people of like rank and condition of society and the condition of the estate left by the decedent. (*O'Reilly v. Kelly*, 833.)

See Executors and Administrators; Homesteads, 5.

## ESTOPPEL.

1. **ESTOPPEL IN PAIS—PROHIBITED CONTRACT.**—When suit is brought upon a contract prohibited by law, the defendant may be estopped, by his admissions or by his conduct, from pleading that the contract is void, where such admissions or conduct have led the plaintiff to act to his detriment. (*Pritchett v. Aherns*, 274.)

2. **ESTOPPEL IN PAIS—NOTE GIVEN FOR AN ILLEGAL CONSIDERATION.**—If a person, about to buy a note given for an illegal consideration, asks the maker if it is "all right," and he

replies that it is, and does not intimate that he has any defense thereto, but requests a little delay in order that he may trade horses to the payee for the note and thus pay it more cheaply than he could with money, the maker's admissions and conduct estop him from denying the validity of the note in the hands of such person, who has purchased it for a valuable consideration. (*Pritchett v. Aherns*, 274.)

3. **ESTOPPEL—FRAUD—WHAT IS.**—Conceding that there can be no estoppel without fraud, it is a fraud to deny what has been previously affirmed. (*Pritchett v. Aherns*, 274.)

## EVIDENCE.

1. **JUDICIAL NOTICE—ABBREVIATIONS.**—Courts will take judicial notice of the meaning of abbreviations which are in common use, and have a well-understood meaning among people in general. (*Dages v. Brake*, 556.)

2. **EVIDENCE.—FOREIGN LAWS** must always be proved as facts. (*Fish v. Smith*, 161.)

3. **EVIDENCE.—LETTERS DULY MAILED ARE PRESUMED** to have been received by the addressee. (*Garland v. Gaines*, 182.)

4. **EVIDENCE THAT A WRITTEN LEASE** was sent to the nonresident lessee and came back with his name affixed thereto, and that he subsequently occupied the leased premises, is *prima facie* proof of the execution of the lease by him. (*Garland v. Gaines*, 182.)

5. **EVIDENCE—TRIAL WITHOUT JURY.**—In an action tried without a jury, the admission of improper evidence alone is not ground for reversal. (*Winchell v. Waukesha*, 902.)

6. **ESTATES OF DECEDENTS—DECLARATIONS TO PROVE PEDIGREE.—THE GENERAL RULE** is, that the declarations of a deceased person are not admissible in evidence on a question of pedigree, until there is some proof outside of such declarations that the declarant was in fact a member of the family about which he was speaking. (*Malone v. Adams*, 259.)

7. **ESTATES OF DECEDENTS—DECLARATIONS TO PROVE PEDIGREE.**—The declarations of a decedent, whose estate is in controversy, that he was related to the one who claims his estate, are admissible in evidence without other proof of the fact of relationship. (*Malone v. Adams*, 259.)

8. **EVIDENCE—EXHIBITION OF CHILD AS.**—On a prosecution for bastardy, the exhibition of a child nine months old to the jury for the purpose of showing its resemblance to the defendant cannot be permitted. (*State v. Harvey*, 350.)

9. **CRIMINAL LAW—EVIDENCE.**—Statements made to an accused by the person fatally wounded, charging the former with having wounded him, if at once denied by the accused, are inadmissible in evidence when not made as dying declarations nor constituting any part of the *res gestae*. Such denials are also inadmissible. (*Brown v. State*, 641.)

10. **EVIDENCE—DYING DECLARATIONS OF WOMAN SUBJECTED TO AN ABORTION.**—Under an indictment charging manslaughter in causing the death of a woman by means of an abortion, evidence of the dying declarations of the woman is admissible in evidence, since the indictment charges a homicide. (*Worthington v. State*, 506.)



11. EVIDENCE.—DYING DECLARATIONS are admissible in evidence when the declarant constantly believes that death is approaching, although the attending physician holds out hope of recovery. (Worthington v. State, 506.)

12. EVIDENCE—DYING DECLARATIONS—IDENTITY OF PARTY NAMED.—If a woman makes a dying declaration that a certain person, naming him, committed an abortion upon her, the identity of the person named with the accused is a question for the jury. (Worthington v. State, 506.)

13. EVIDENCE—DYING DECLARATIONS.—If a person has expressed a continuing belief that he is about to die, declarations made by him on a subsequent day, and while such belief still continues, as to the cause of death are admissible in evidence. (Worthington v. State, 506.)

14. EVIDENCE—DYING DECLARATIONS.—A witness attempting to testify to dying declarations made to him need not repeat the exact language of the declarant, but may give his recollection of its substance. (Worthington v. State, 506.)

15. EVIDENCE.—DYING DECLARATIONS made in response to questions propounded to the declarant are competent evidence. (Worthington v. State, 506.)

#### EXCEPTIONS, BILL OF.

See Appeal, 2-6.

#### EXECUTIONS.

1. EXECUTION—MOTION TO QUASH.—If an execution is irregularly issued, or is being executed in an irregular, oppressive, or fraudulent manner, a motion to quash is the proper remedy for the injured party. (Marks v. Stephens, 750.)

2. EXECUTION SALE.—AN INJUNCTION WILL NOT ISSUE to restrain an execution sale because of irregularity in the issuance of the writ, and in the subsequent proceedings thereunder. (Marks v. Stephens, 750.)

3. INJUNCTION AGAINST EXECUTION SALE—ISSUANCE OF—IRREGULARITIES WILL NOT JUSTIFY.—When the individual personal property of a surviving partner, who is administrator of the partnership estate, is seized under execution on a judgment against the firm, a sale thereunder will not be restrained by injunction, because the execution was issued in the name of a dead man, or the judgment, prior to the issuance of the execution, had been presented as a claim against the estate, and neither allowed nor disallowed, nor because the levy was made on individual personal property. A motion to quash is the proper remedy. (Marks v. Stephens, 750.)

4. EXECUTIONS AGAINST MINORS—CONFLICT OF JURISDICTION.—If a minor's property has been legally seized under attachment in an action against him, the subsequent appointment of a guardian for him does not transfer to the appointing court jurisdiction to enforce the judgment obtained against him, nor remove the property from the custody of the court rendering such judgment, so as to rob it of power to issue execution against such property. (Hawk v. Harris, 352.)

#### EXECUTORS AND ADMINISTRATORS.

EXECUTORS AND ADMINISTRATORS—SUITS AGAINST —JUDGMENT.—When one is sued as executor or administrator, he

must so plead as to protect himself from individual liability, and any judgment obtained is conclusive on both parties as to all questions which were raised in the pleadings or which could properly have been raised therein. (*Wilkins v. Gibson*, 204.)

See Estates of Decedents.

### EXEMPTIONS.

**EXEMPTIONS—WAGES—EXTENSION OF STATUTORY PERIOD.**—Under a statute providing that the personal earnings of a debtor "at any time within ninety days next preceding the levy" shall be exempt from liability for his debts, the period of time during which litigation to recover such earnings may be pending, cannot be eliminated in the computation of such ninety days. (*Chadwick v. Stout*, 334.)

See Taxation, 2.

### FALSE IMPRISONMENT.

**FALSE IMPRISONMENT—WANT OF JURISDICTION.**—An officer who, without jurisdiction, causes to be arrested without a warrant, and who fines and imprisons, a person who has committed no offense in his presence, is liable in an action for false imprisonment. (*State v. McDaniel*, 618.)

### FERRIES.

**1. PUBLIC FERRIES—FRANCHISE—JUDICIAL INTERFERENCE.**—The action of county commissioners in granting a franchise to operate a public ferry, if done within the scope of their duties and discretionary power, cannot be interfered with by the courts, merely because such action is inexpedient and unwise, unless fraud or corruption is shown. (*Hudspeth v. Hall*, 200.)

**2. PUBLIC FERRY—APPLYING FOR FRANCHISE.—A JUDICIAL RULING** that a private person who owns land on both sides of a river cannot establish a public ferry without a grant from the proper county authorities, will not prevent such person from thereafter applying for and securing a grant authorizing him to maintain such a ferry. (*Hudspeth v. Hall*, 200.)

### FISHWAYS.

See Constitutional Law, 15, 16.

### FIXTURES.

**1. FIXTURES—GENERAL RULE TO DETERMINE WHAT ARE.**—Whatever is once annexed to the freehold by its owner, to be used and enjoyed in connection therewith, becomes part of the realty, and passes by a conveyance thereof. (*Canning v. Owen*, 858.)

**2. FIXTURES—MODE OF AFFIXING IS NOT CONCLUSIVE.** It is not necessary to impose upon a chattel the character of a fixture that it be so affixed to the realty that it cannot be removed without physical injury thereto, if it has been attached with a view of enhancing the value of the realty and for the purpose of being permanently used in connection therewith. The intention of the owner need not be expressed in words, but must ordinarily be inferred from the nature of the articles affixed, the relation and situation of the parties interested, the policy of the law with respect thereto, the mode of annexation and the purpose for which

it was made. The question whether chattels are to be regarded as fixtures depends less upon the measure of their annexation than upon their own nature, and their adaption to the purpose for which they are used. (*Canning v. Owen*, 858.)

3. **ELECTRIC LIGHT FIXTURES** which take the place and serve the purpose of ordinary gas fixtures, though they may be removed without physical injury to the freehold, must, as between mortgagor and mortgagee, be regarded as part of the realty which the former has no right to detach and remove after a sale has been made under the mortgage. (*Canning v. Owen*, 858.)

4. **FIXTURES.—BRICK, LUMBER, AND OTHER PERSONALTY**, used for the construction of a substantial and permanent building upon the land, become a part of the realty. (*Guernsey v. Phinizy*, 270.)

5. **FIXTURES — RECONVERSION INTO PERSONALTY.—BRICK AND LUMBER** used in the construction of a house become a part of the land, and so remain until severed and reconverted into personalty by the owner. Hence, if a house is accidentally destroyed and falls to the ground, the brick and lumber remain a part of the land as long as the owner leaves them as they have fallen, and until he does some act evidencing his intention to reconvert them into personalty. (*Guernsey v. Phinizy*, 270.)

6. **FIXTURES—RETAINING CHARACTER AS PERSONALTY.**—Parties may by agreement retain a fixture in its character as personalty notwithstanding its physical annexation to a building. (*Fuller-Warren Co. v. Harter*, 867.)

7. **FIXTURES.—TO CHANGE PROPERTY FROM ITS CHATTEL CHARACTER** to that of real estate, it is necessary that there should be physical annexation of the chattel to the realty, adaptation of the improvement to the use to which the realty is devoted, and intent of the person causing the annexation to make a permanent improvement of the freehold. (*Fuller-Warren Co. v. Harter*, 867.)

8. **FIXTURES—CHATTEL MORTGAGE—RIGHTS OF REALTY MORTGAGEE.**—Personal property incorporated into a mortgaged building, with the intent to make it a permanent part thereof, becomes a part of the mortgaged security, notwithstanding the vendor reserves a chattel mortgage thereon to secure payment, where the real estate mortgagee is not a party to the transaction. (*Fuller-Warren Co. v. Harter*, 867.)

9. **FIXTURES—CHATTEL CHARACTER—REMOVAL WITHOUT INJURY—RIGHTS OF VENDOR AND MORTGAGEE.**—A vendor of chattels, which are permanently annexed to mortgaged realty, cannot by agreement with the mortgagor preserve such chattels in their character as personalty as against the mortgagee, even though they may be removed without injury either to the realty or to the value of the mortgage security as it existed before the annexation. (*Fuller-Warren Co. v. Harter*, 867.)

## FOREIGN LAW.

See Evidence, 2.

## FORGED CHECK.

See Banking.



**FRAUD.**

**DECEPTION RESPECTING THE TITLE TO REAL PROPERTY.**—Though the title to real property appears upon, and may be ascertained from an examination of, the public records of the county, an action may be maintained against one who knowingly misrepresents the condition of such title to another, who, in ignorance of the title, relies upon such representation to his injury. (*Hunt v. Barker*, 812.)

See Estoppel, 3.

**FRAUDULENT CONVEYANCES.**

**1. FRAUDULENT CONVEYANCES — LIMITATIONS.**—The statute of limitations does not begin against one who has acquired a right, by virtue of a sale under execution against a husband, to set aside a previous fraudulent conveyance from such husband to his wife, until the date of the sheriff's deed under the execution. (*Chalmers v. Sheehy*, 62.)

**2. FRAUDULENT CONVEYANCES — ACTION IN TORT.** One who has a cause of action in tort is a creditor of the tortfeasor before the commencement of the action thereon, as well as after, and, as such creditor is, upon recovering judgment, entitled to avoid a fraudulent transfer antedating the commencement of the action. (*Chalmers v. Sheehy*, 62.)

**3. FRAUDULENT CONVEYANCES — ACTION IN TORT—HUSBAND AND WIFE.**—If a husband makes a gift of all of his property to his wife, pending an action for slander against him, with intent to defeat any judgment recovered against him, the plaintiff may, upon recovering such judgment, assail such gift as fraudulent. (*Chalmers v. Sheehy*, 62.)

**4. FRAUDULENT CONVEYANCES—FRAUD OF HUSBAND—INNOCENCE OF WIFE.**—If a husband makes a fraudulent gift of all of his property to his wife, with intent to defeat any judgment recovered in a pending action for slander, the plaintiff, upon recovering such judgment, may assail the gift as fraudulent, and the fact of the innocence of the wife from any participation in the fraud, or that she did not know the condition of her husband's business affairs, is immaterial. (*Chalmers v. Sheehy*, 62.)

See Husband and Wife, 1.

**FUNERAL EXPENSES.**

See Estates of Decedents, 2-4.

**GAMBLING.**

See Negotiable Instruments, 7, 8.

**GARNISHMENT.**

See Attachment and Garnishment.

**GUARANTY.**

**1. GUARANTY — NOTICE TO GUARANTOR.**—When a guaranty is an effort to become responsible for a credit that may or may not be given to another, at the option of the party to whom the application for credit is made, the guarantor, must within a reasonable time, be notified of the acceptance of the guaranty. (*German Sav. Bank v. Drake Roofing Co.*, 335.)

**2. GUARANTY—OFFER OF—NOTICE OF ACCEPTANCE.—**

An instrument by which guarantors promise to pay to a certain bank all indebtedness of a third person, not exceeding a certain amount that may accrue within a certain time waiving demand, notice and protest on the part of the bank in collecting, not founded on any consideration except future advances to be made, and not signed at the bank's request or in its presence, is a mere offer of guaranty requiring notice of acceptance by the bank to bind the guarantors. (*German Sav. Bank v. Drake Roofing Co.*, 335.)

**3. GUARANTY—NOTICE TO GUARANTOR.—INSOLVENCY OF THE PRINCIPAL DEBTOR** at the time a guaranty is made to secure future advances to him for a limited time and the continuance of such insolvency, are sufficient excuse for not giving notice to the guarantors of the advances made, or of the state of the account at the expiration of the guaranty. (*German Sav. Bank v. Drake Roofing Co.*, 335.)

**4. GUARANTY.—DEMAND AND NOTICE OF NONPAYMENT** by the principal debtor are not essential to a recovery against his guarantor. (*German Sav. Bank v. Drake Roofing Co.*, 335.)

**5. LEASE.—GUARANTY OF PAYMENT OF RENT** and performance of covenants by the lessee during the full term of the lease, made in consideration of the lease of the premises, is an absolute, and not a conditional, undertaking, upon which the guarantor is liable immediately upon the default of the lessee. (*Garland v. Gaines*, 182.)

**6. GUARANTY—CONSIDERATION.—If a guaranty for the performance of the covenants of a lease is executed contemporaneously therewith, and is an essential ground of the credit extended to the lessee, that is sufficient consideration for the contract of guaranty.** (*Garland v. Gaines*, 182.)

**7. GUARANTY—DELIVERY.—If a guaranty for the performance of the covenants of a lease is executed subsequently to the lease, it must be deemed to have been made contemporaneously with it, if delivered at the same time and before the lessee is permitted to occupy the leased premises.** (*Garland v. Gaines*, 182.)

**GUARDIAN AND WARD.**

**1. GUARDIAN AND WARD—DEATH OF WARD TERMINATES JURISDICTION.—**The superior court is without jurisdiction after the death of a ward to order a sale of his real estate, though to pay an indebtedness due from him to his guardian, upon the settlement of the latter's accounts. (*Estate of Livermore*, 37.)

**2. GUARDIAN AND WARD—DEATH OF WARD—EXECUTION OF DEED AFTER.—**A guardian can execute a deed only in the name of a living ward. After the ward's death, this power is gone. (*Estate of Livermore*, 37.)

**3. GUARDIAN AND WARD—DEATH OF WARD—REMEDY OF GUARDIAN FOR DEBT DUE.—**The remedy of a guardian to enforce an indebtedness due from his deceased ward is to administer upon his estate. (*Estate of Livermore*, 37.)

**4. GUARDIANS AD LITEM—COMPENSATION, STANDARD OF.—**Guardians ad litem being officers of the court, their compensation is to be measured by the standard of official emoluments, rather than by that of the highest prices demanded and paid between individuals free to contract as they will. (*Richardson v. Tyson*, 937.)

**5. GUARDIAN AD LITEM—ATTORNEYS—PAYMENT FOR SERVICES ON APPEAL.**—Where an attorney agrees to act as guardian ad litem and conduct litigation for a stated sum at the trial, and on appeal, and after being defeated at the trial, no appeal is taken for two years through the opposition of other counsel, who impugn his motives, and the general guardian refuses him aid and tries to secure his removal, such guardian ad litem is entitled to compensation for his services on appeal, independent of the agreement, the situation being so changed as to render him not bound by it. (*Richardson v. Tyson*, 937.)

**6. GUARDIAN AD LITEM—EMPLOYING ADDITIONAL COUNSEL.**—A guardian ad litem who employs additional counsel without an order of court assumes the peril that his action may be disproved, and he be left to bear the expense personally. (*Richardson v. Tyson*, 937.)

**7. GUARDIAN AD LITEM—EMPLOYING COUNSEL—WHEN JUSTIFIED.**—If, after a guardian ad litem has employed special counsel, it appears that such precaution was reasonably necessary for the welfare of the minors, and such as the court would have authorized in advance had application been made, the reasonable expense thus incurred will be allowed. (*Richardson v. Tyson*, 937.)

**8. GUARDIAN AD LITEM—FEES ON HEARING OF ACCOUNT—ATTORNEYS' FEES.**—A guardian ad litem who acts fairly, makes full disclosure, and does not make unreasonable demands for credit or allowance, may, in the discretion of the court, be allowed reasonable compensation at the hearing on his account, including necessary attorneys' fees. (*Richardson v. Tyson*, 937.)

**9. GUARDIAN AD LITEM—EMPLOYING ATTORNEY AT HEARING ON ACCOUNT.**—A guardian ad litem may employ an attorney to represent him at the hearing on his account only under extraordinary circumstances, and it is a question for the court whether the extraordinary circumstances exist which render such employment necessary. (*Richardson v. Tyson*, 937.)

**10. GUARDIAN AD LITEM—SERVICES PERFORMED BY AN ATTORNEY** of a guardian ad litem which the guardian himself should have performed are not entitled to an allowance as for a distinctive disbursement therefor; but their character and amount may be taken into consideration as bearing upon the amount of proper allowance to the guardian. (*Richardson v. Tyson*, 937.)

**11. GUARDIAN AD LITEM—COMPENSATION—OPINIONS OF OTHER ATTORNEYS.**—In determining the proper amount of compensation due an attorney who has acted as a guardian ad litem, the opinions of other attorneys are advisory only, and, although unanimous are not controlling on the court. (*Richardson v. Tyson*, 937.)

See Partition, 2.

## HABEAS CORPUS.

See Judgments, 16.

## HIGHWAYS.

**1. HIGHWAYS—BICYCLES—USE OF SIDEWALK.**—A bicycle is a vehicle, and has no lawful right to the use of a sidewalk. (*Knouff v. Logansport*, 292.)

**2. HIGHWAYS.**—A BRIDGE connecting public highways and for public use is itself a public highway, and constitutes part of



the highways with which it is connected. (*Brand v. Multnomah County*, 772.)

3. LICENSE TO TAKE TOLLS—EXPIRATION OF, AND ITS EFFECT.—When a license to take bridge tolls has expired, the right to the free use of the bridge as a public highway becomes vested in the people. (*Brand v. Multnomah County*, 772.)

#### HOMESTEADS.

1. HOMESTEAD—ALIENATION.—The homestead right is not exclusively for the benefit of married women, but extends to the whole family, and is inalienable otherwise than in the precise manner indicated in the statute. (*Minnesota Stoneware Co. v. McCrossen*, 927.)

2. HOMESTEAD—MORTGAGE — ESTOPPEL — SIGNATURE OF WIFE.—A mortgage of the homestead of a married man, executed by him, with the wife's signature affixed thereto by her verbal request, for the purpose of obtaining money for her use, together with the full execution of such purpose, does not estop her from denying the validity of the mortgage. (*Minnesota Stoneware Co. v. McCrossen*, 927.)

3. HOMESTEAD—TEMPORARY ABSENCE—VOTING IN ANOTHER STATE.—The temporary removal of a man from his homestead to another state for the benefit of his wife's health, with the intent to return and make the premises his home, does not constitute an abandonment of the homestead, although he may have exercised the elective franchise in the other state while residing there. (*Minnesota Stoneware Co. v. McCrossen*, 927.)

4. HOMESTEADS — EXTENSION OF MORTGAGE ON.—A husband cannot, without the consent of his wife, extend the duration of a mortgage lien on their homestead. (*Portsmouth Sav. Bank v. Hardman*, 381.)

5. HOMESTEADS—PROBATE SALE OF—CONCLUSIVENESS OF.—Although the national statute provides that no homestead acquired under it shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of patent, a judgment of a probate court ordering a sale of such homestead acquired under such law for the payment of debts contracted prior to the issuance of patent therefor is valid as against a collateral attack, unless the record of such judgment affirmatively shows that such debts antedate the patent. (*J. B. Watkins Land etc. Co. v. Mullen*, 372.)

See Mortgages, 6-8; Taxation, 4.

#### HOMICIDE.

1. MURDER IN RESISTING ARREST.—IF A SUSPECTED FELON, IN RESISTING ARREST, or in endeavoring to escape after arrest, kills the arresting officer, he commits murder. (*State v. Evans*, 669.)

2. HOMICIDE.—AN OFFICER WHO NECESSARILY KILLS A SUSPECTED FELON when he resists arrest, or endeavors to escape, commits justifiable homicide. (*State v. Evans*, 669.)

3. MURDER IN RESISTING ARREST—KNOWLEDGE OF OFFICIAL CHARACTER.—One who is arrested by an officer in uniform, who is known to him, cannot justify the killing of such officer on the ground that he had no notice of the officer's official character. (*State v. Evans*, 669.)

See Abortion; Criminal Law, 3.

**HUSBAND AND WIFE.**

**1. HUSBAND AND WIFE—CONVEYANCE TO PREVENT INHERITANCE BY.—FRAUD** on marital rights cannot be predicated of a voluntary conveyance by either husband or wife, made to prevent the other from inheriting. (*Jones v. Somerville*, 627.)

**2. HUSBAND AND WIFE—MORTGAGE, BY WIFE, OF ESTATE BY ENTIRETY.—**Under statutes authorizing a wife to sell and convey her property, by her sole deed, "to the same extent and in the same manner that her husband can property belonging to him," she may mortgage her interest in land held by the entirety with like effect as her husband, and such a mortgage is valid, although the husband did not join in its execution. (*Howell v. Folsom*, 785.)

**3. A HUSBAND CANNOT TESTIFY AGAINST HIS WIFE FOR THE PURPOSE OF PROVING A CONTRACT BETWEEN THEM** to pay for his services, if the statute of the state declares that a husband is not permitted to disclose any communication made by him to his wife during their marriage, except in trials for divorce. (*Robinson v. Robinson*, 832.)

**4. EVIDENCE—TESTIMONY OF DIVORCED HUSBAND.—**If a statute provides that husband is not permitted to disclose any communication made to him by his wife during their marriage, except in trials for divorce, the prohibition is not removed or weakened by their subsequent divorce. (*Robinson v. Robinson*, 832.)

See Constitutional Law, 23; Fraudulent Conveyances, 3, 4; Judgments, 12-14; Power of Attorney, 4.

**ILLEGITIMATES.**

**1. ILLEGITIMATES—CONSTRUCTION OF STATUTES RESPECTING.—**The rule that statutes making innovations on the common law must be strictly construed applies to statutes conferring rights on illegitimate children. (*Alabama etc. Ry. Co. v. Williams*, 624.)

**2. ILLEGITIMATES.—THE WORD "CHILDREN"** used in a statute does not include illegitimates. (*Alabama etc. Ry. Co. v. Williams*, 624.)

**3. ILLEGITIMATES.—**The mother of a bastard cannot sue for injury to him. (*Alabama etc. Ry. Co. v. Williams*, 624.)

**4. ILLEGITIMATES.—THE MOTHER** of a bastard cannot inherit from him. (*Alabama etc. Ry. Co. v. Williams*, 624.)

See Evidence, 8; Parent and Child.

**INDICTMENT.**

**1. INDICTMENT—DUPLICITY.—**An indictment charging the burning of a cotton-house, the property of a certain person, and the burning of the cotton in the house, the joint property of such person and another, is not bad for duplicity. (*Clue v. State*, 643.)

**2. INDICTMENT—DUPLICITY.—**Charging two offenses in one court in an indictment is bad practice, but objection thereto cannot be raised except by demurrer. (*Clue v. State*, 643.)

See Abortion.

## INFANTS.

1. **AN INFANT IS ALWAYS THE WARD OF EVERY COURT** wherein his rights or property are brought in jeopardy, and is entitled to the most jealous care that no injustice be done him. (*Richardson v. Tyson*, 937.)

2. **CONTRACTS OF MINORS.**—A promise by a minor to marry may constitute an inducement to sexual intercourse, though both parties know that the promise cannot be enforced. (*Hawk v. Harris*, 352.)

See Executions, 4; Guardian and Ward.

## INJUNCTIONS.

1. **A MANDATORY INJUNCTION MAY ISSUE TO COMPEL THE RETURN OF CERTAIN BOOKS** which have been loaned to the defendant temporarily, where they have no ascertainable value in money but great value to the complainant as an account of its history, and hence an action of damages must be quite an inadequate remedy. (*Battalion Westerly Rifles v. Swan*, 849.)

2. **INJUNCTION — TRADEMARK — LACHES — WANT OF EQUITY.**—If a trademark has been used by two concerns for ten years, after which one of them applies for an injunction to contest the right of the other to use it, the application will be denied regardless of the rightful ownership of the trademark, where the plaintiff stood by all that time, knowing that the other concern was expending large sums of money in extending the use of, and demand for, the article on which the trademark was used. (*Old Times Distillery Co. v. Casey*, 480.)

See Executions, 2, 3; Municipal Corporations, 9, 10.

## INSURANCE.

1. **INSURANCE—CONSTRUCTION OF.**—A contract of insurance is to be interpreted by the same rules as are other contracts, so as to give effect to the mutual intention of the parties. This intention is to be deduced, if possible, from the language of the contract. (*Schroeder v. Imperial Ins. Co.*, 17.)

2. **INSURANCE—CONDITION AGAINST FORECLOSURE—KNOWLEDGE OF INSURED.**—A condition that a policy shall be void "unless otherwise provided by agreement indorsed thereon or added thereto, if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed," is directed to the fact of knowledge on the part of the insured of the commencement of foreclosure proceedings, and not to the time that he may obtain such knowledge. The reasonable construction to be given to the clause is, that whenever he shall have knowledge of the proceedings, and not before, and shall fail to obtain the consent of the insurer thereto, the policy shall be avoided. (*Schroeder v. Imperial Ins. Co.*, 17.)

3. **INSURANCE—VENDOR AND VENDEE.**—If insured property is destroyed after the making of a contract of sale, but before the payment of the purchase money and the execution of the conveyance, the proceeds of the insurance belong to the vendor as between him and the company; but he acts as trustee for the vendee, who, upon payment of the purchase price, is entitled to the insurance money in equity, although he intended to tear the buildings down. (*Skinner etc. Co. v. Houghton*, 485.)



**4. INSURANCE—CHANGE IN INTEREST.**—By a contract for the sale of insured property, the policy is avoided when it provides that it shall be void if any change, other than by death, takes place in the interest, title, or possession of the subject of the insurance. (Skinner etc. Co. v. Houghton, 485.)

**5. INSURANCE, LIFE—SUICIDE OF INSURED AS DEFENSE.**—If a life insurance policy does not provide that it shall become void in the event of the suicide of the insured, his suicide while sane is not a defense to an action on the policy by the beneficiary, unless the policy was obtained by the deceased with intent to commit suicide and thus defraud the insurer. (Supreme Conclave etc. v. Miles, 528.)

**6. INSURANCE, LIFE—BENEFIT SOCIETY—SUICIDE AS DEFENSE.**—If the membership certificate, constitution, or by-laws of a benefit society contain no provision qualifying the right to recover the benefit if the insured member takes his own life, his suicide is not a defense as against his beneficiary, unless the member joined the society with intent to commit suicide, and the burden to show such intent is upon the defendant. (Supreme Conclave etc. v. Miles, 528.)

**7. INSURANCE, LIFE—EFFECT OF KILLING OF ASSURED BY BENEFICIARY.**—A beneficiary in a life insurance policy payable to him, his heirs, or legal representatives, who murders the insured, forfeits his rights under the policy, and neither he, his assignee, nor his children as heirs can recover thereon during his lifetime. (Schmidt v. Northern Life Assn., 323.)

**8. INSURANCE, LIFE—PROPERTY RIGHTS OF BENEFICIARY.**—A beneficiary in a benefit certificate of life insurance has no vested interest or property right therein during the life of the assured, as he retains the right of appointment and of changing the beneficiary. (Schmidt v. Northern Life Assn., 323.)

**9. INSURANCE, LIFE—KILLING OF ASSURED BY BENEFICIARY—RIGHT OF ADMINISTRATOR TO RECOVER.**—If the beneficiary in a life insurance policy kills the insured, he cannot recover from the insurance company, but the insurance money forms a part of the estate of the insured and may be recovered by his administrator, as if no beneficiary had been designated. (Schmidt v. Northern Life Assn., 323.)

**10. ACTIONS—EVIDENCE OF PAYMENT AS DEFENSE.**—In an action by a divorced wife to recover upon a policy of insurance payable to her, it is no defense that the insurer has paid a judgment recovered against him by the administrator of her deceased husband upon the same policy, and evidence of such payment is properly excluded. (McGrew v. Mutual Life Ins. Co., 20.)

See Benefit Associations.

## INTEREST.

**INTEREST ON JUDGMENTS—VERDICT.**—Under the statutes of Georgia, judgments bear interest only from the time they are entered and signed, and not from the date of the verdict, and the same rule applies to a decree in equity for a specific sum of money. (Guernsey v. Phinizy, 270.)

See Wills, 13-16.

## INTERNAL REVENUE.

**THE FAILURE TO AFFIX INTERNAL REVENUE STAMPS** to a lease as required by United States statute does not render it inadmissible in evidence in the state courts. (*Garland v. Gaines*, 182.)

## INTERSTATE COMMERCE.

**INTERSTATE COMMERCE—PRIVILEGE TAX.**—A statute imposing a privilege tax on all sleeping and palace car companies carrying passengers from one point to another within the state, and also a certain tax per mile "for each mile of railroad over which such company runs its cars," is not void as a regulation of, or license upon, interstate commerce. (*Pullman Co. v. Adams*, 647.)

## ISLANDS.

See *Waters and Watercourses*, 1-4.

## JUDGE.

**JUDGE—DISQUALIFICATION OF.**—The fact that the presiding judge was district attorney, and as such drew the indictment upon which the defendant was tried, does not disqualify the judge from presiding in the case, under a statute prohibiting a judge to preside in any case wherein he may have been of counsel. (*Kirby v. State*, 622.)

## JUDGMENTS.

1. **JUDGMENTS OF PROBATE COURTS—CONCLUSIVE-NESS OF—COLLATERAL ATTACK.**—A probate court has general jurisdiction over the estates of deceased persons. Its judgment in such matter is final unless corrected upon appeal, and is not subject to collateral attack. (*J. B. Watkins Land etc. Co. v. Mullen*, 372.)

2. **JUDGMENTS—RES JUDICATA—FORMER ACQUITTAL.** If a civil action is to secure a forfeiture, which should have been part of the penalty in a former criminal proceeding involving the same matter, and is between the same parties, an acquittal in the criminal proceeding is a bar to the civil suit. (*State v. Meek*, 342.)

3. **JUDGMENTS—RES JUDICATA—EVIDENCE OF FOUNDATION OF JUDGMENT.**—If a plea of res judicata is set up as a defense, oral evidence is admissible to show the facts upon which the former judgment was founded. (*State v. Meek*, 342.)

4. **RES JUDICATA.**—A JUDGMENT BETWEEN A PERSON AND A CORPORATION is not res judicata in subsequent litigation between such person and the members of the corporation. (*Clausen v. Head*, 933.)

5. **RES JUDICATA—INDEPENDENT ACTIONS AGAINST CORPORATION AND MEMBERS.**—The doctrine that a person may sue a corporation and proceed to final judgment without prejudice to his right to thereafter sue for the same wrong against the members of such corporation applies where there are independent causes of action or remedies against such members and the corporation, that may be pursued regardless of each other. (*Clausen v. Head*, 933.)

6. **JUDGMENTS—MERGER.**—All causes of action upon which suit is brought and final judgment obtained are merged in such judgment, and thereby extinguished and cannot be made the basis of a subsequent action or judgment. (*Price v. First Nat. Bank*, 419.)

**7. JUDGMENT—MERGER OF ONE IN ANOTHER.**—A second judgment upon the same cause of action as a prior judgment, although for a less amount, is a waiver of the balance, and an absolute extinguishment of the first judgment. (*Price v. First Nat. Bank*, 419.)

**8. JUDGMENTS—MERGER—EFFECT OF SECOND JUDGMENT.**—If a judgment is recovered upon a prior judgment, the latter is merged in the former, and all of its liens or priorities are released. (*Price v. First Nat. Bank*, 419.)

**9. JUDGMENTS.—SATISFACTION, MERGER, OR EXTINGUISHMENT** of a personal judgment in an action to foreclose a real estate mortgage, releases the mortgage lien. (*Price v. First Nat. Bank*, 419.)

**10. OFFICER'S RETURN—CONTRADICTION OF IN A SUIT FOR RELIEF FROM A JUDGMENT.**—A bill in equity lies to enjoin an action at law on a judgment which was obtained by the fraud of the officer charged with the service of the writ in the original action, and, for the purpose of supporting the bill, evidence may be received to impeach the officer's return on such writ. (*Dowell v. Goodwin*, 842.)

**11. JUDGMENT—REMEDY AT LAW AGAINST—WHEN INADEQUATE.**—If a judgment has been procured against a defendant by the false return of service of process against him, he cannot be denied the right to enjoin such judgment on the ground that he should first pay it and then resort to an action against the officer who made such return. This would involve circuitry and remoteness in obtaining redress, and an uncertainty as to the result quite foreign to the spirit of equity. (*Dowell v. Goodwin*, 842.)

**12. FALSE RETURN—VACATING JUDGMENT.**—A judgment by default rendered on a false return will be set aside or its execution enjoined by a court of equity. (*Smoot v. Judd*, 738.)

**13. MARRIED WOMAN—SUIT ON INVALID NOTE—WAIVER OF DEFENSE.**—If a married woman is sued upon a contract which she had no power to make, but this does not appear from the complaint, and she fails to interpose such defense, a judgment against her is valid, since the defense is extinguished in the judgment and cannot afterward be set up against it. (*Smoot v. Judd*, 738.)

**14. MARRIED WOMEN—RELIEF FROM JUDGMENT—FAILURE TO SERVE WITH PROCESS.**—A COURT OF EQUITY will enjoin the enforcement of a judgment against a married woman, obtained in an action to which she had a meritorious defense, but which she was prevented from interposing by reason of the fact that she was not served with process and had no knowledge of the pendency of the suit. (*Smoot v. Judd*, 738.)

**15. RES JUDICATA—PARTITION—STRIKING OUT ANSWER.**—Where, in a partition suit, the answer of a defendant, who claims title to the property, is stricken out on the ground that the question of title could not be tried in the case, and that any interest he might have could not be affected by the decree, the decree rendered is not *res judicata* as to such claim of title. (*Smoot v. Judd*, 738.)

**16. JUDGMENTS—COLLATERAL ATTACK—HABEAS CORPUS.**—Irregularities preceding a judgment rendered by a criminal or other court of competent jurisdiction cannot be collaterally attacked or corrected by a proceeding in *habeas corpus*. (*In re Corum*, 382.)

See Ejectment; Interest.



**JUDICIAL NOTICE.**

See Evidence, 1.

**JURISDICTION.**

1. **JURISDICTION—AMOUNT IN DISPUTE.**—Where an action is brought to enjoin a nuisance which affects property valued at ten thousand dollars, the damages claimed are but six thousand, and the nuisance can be abated for five thousand, the amount in controversy is less than twenty-five thousand dollars, so as to confer jurisdiction on the court. (*Winchell v. Waukesha*, 902.)

2. **JURISDICTION—PLEA TO—MERITS OF CASE.**—In trying a plea to the jurisdiction of the court it is not proper to go into the merits of the case. (*Central of Georgia Ry. Co. v. Brown*, 250.)

See Criminal Law, 3.

**JURY.**

**JURY—CHALLENGE FOR CAUSE—FORM OF.**—To merely challenge a juror "for cause" is insufficient; the cause of the challenge must be distinctly specified. (*State v. Evans*, 669.)

**LANDLORD AND TENANT.**

1. **LANDLORD AND TENANT.—THE PAYMENT OF RENT** is a fact going to the establishment of a tenancy, but by no means sufficient in or of itself. (*Sanford v. Herron*, 703.)

2. **LANDLORD AND TENANT—WATER RATES—LIABILITY FOR.**—A lessee of premises, part of the appurtenances of which are pipes and other fixtures for the purpose of receiving water from municipal waterworks, does not owe to his lessee the duty of supplying the premises with water, nor of paying bills therefor during the continuance of the tenancy, though the statute establishing such waterworks provides that the owner, as well as the occupant of premises supplied with water, may be held liable to pay therefor. Especially is this true when the water is measured by a meter and paid for by the cubic foot, and when it must hence be impossible for a landlord to determine in advance the amount for which the premises may become chargeable during the lease. (*Sheldon v. Hamilton*, 839.)

See Guaranty, 5.

**LARCENY.**

1. **LARCENY — MISDEMEANORS—PRINCIPALS—CONSPIRACY.**—A private detective who induces a merchant to offer a reward for the detection of a thief in his employ, when no theft has been committed, and then, through an agent, induces an employé to steal goods and returns them in order to obtain the reward, is guilty of larceny. (*Slaughter v. State*, 242.)

2. **LARCENY—INTENT TO APPROPRIATE—HOLDING FOR REWARD.**—To constitute a larceny it is sufficient if the property be taken and carried away with the intent to appropriate any pecuniary right or interest therein, as where it is taken with the expectation of claiming a reward for its return. (*Slaughter v. State*, 242.)

3. **LARCENY—POSSESSION OF STOLEN GOODS.—DECLARATIONS OF A PERSON IN POSSESSION** of stolen goods explaining such possession, made immediately upon their dis-

covery in his possession, are part of the *res gestae*, and admissible in evidence upon the trial for the larceny though self-serving. (State v. Gillespie, 411.)

4. **LARCENY—POSSESSION OF STOLEN GOODS—PRESUMPTION OF GUILT.**—Mere possession of goods recently stolen from a burglarized house is not of itself evidence tending to show, as matter of law, that the possessor is guilty of the larceny; nor is mere possession, in connection with other criminating circumstances, sufficient, as matter of law, to show guilt, or even raise a presumption of guilt of either the larceny or the burglary. (State v. Gillespie, 411.)

5. **LARCENY—POSSESSION OF STOLEN GOODS—EXPLANATION—PRESUMPTION.**—The possession of goods recently stolen from a burglarized house, to constitute evidence tending to show guilt of the larceny, or to be sufficient in connection with other criminating circumstances, to raise a presumption of guilt of the larceny and the burglary, must be unexplained, because it is only the unexplained recent possession of stolen goods that authorizes an inference of guilt. (State v. Gillespie, 411.)

#### LEASE.

See Guaranty, 5; Landlord and Tenant.

#### LEGACY.

See Wills, 11-16.

#### LETTERS.

See Evidence, 3, 4.

#### LIBERTY OF PRESS.

See Constitutional Law, 6-9.

#### LICENSE.

See Highways, 3.

#### LICENSE TAX.

See Taxation, 3.

#### LICENSEES.

**LICENSEES—OWNER'S DUTY.**—A licensee who, without invitation or inducement of the owner, goes upon his land, takes such permission with all the dangers attending it. The owner owes him no duty except not to inflict upon him a willful or wanton wrong, and is not liable for the negligence of his servant toward such licensee. (Illinois Cent. R. R. Co. v. Arnola, 645.)

#### LIENS.

See Agistment; Warehousemen.

#### LIFE TENANT.

See Estates.

### LIMITATION OF ACTIONS.

#### 1. LIMITATION OF ACTIONS—CERTIFICATE OF DEPOSIT.

The statute of limitations begins to run against a demand certificate of deposit from its date. (*Mereness v. First Nat. Bank*, 318.)

#### 2. LIMITATION OF ACTIONS—CERTIFICATE OF DEPOSIT—DEATH OF DEPOSITOR.—

The running of the statute of limitations against a certificate of deposit is not interrupted by the death of the depositor. (*Mereness v. First Nat. Bank*, 318.)

#### 3. LIMITATION OF ACTIONS—CERTIFICATE OF DEPOSIT—FRAUD AND CONCEALMENT.—

Denial by a bank to an administrator of liability on a lost certificate of deposit of his decedent, and that evidence of such liability existed in the books of the bank, though made with knowledge that such statement is false, is not such actual fraudulent concealment as will toll the statute of limitations as to the certificate of deposit. (*Mereness v. First Nat. Bank*, 318.)

#### 4. NOTICE—FRAUD—STATUTE OF LIMITATIONS.—

Mere filing a bill in equity to cancel a deed for fraud, without any service of summons on the defendant, does not impart notice to him of the concealed fraud charged in the bill. And thereby put the statute of limitations in operation against him. (*North American Trust Co. v. Lanier*, 635.)

See Adverse Possession; Ejectment, 2, 3; Fraudulent Conveyance, 1; Pleading, 5.

### LOTTERY.

1. A LOTTERY IS A SCHEME for the distribution of prizes by chance. (*State v. Dalton*, 818.)

2. LOTTERY, WHAT IS NOT.—A METHOD OF DOING BUSINESS BY WHICH THE VENDOR OF ARTICLES GIVES THE PURCHASER a stamp or other device which entitles him to obtain from some other person some article of merchandise in addition to that actually sold is not a lottery, and therefore cannot be forbidden by statute. (*State v. Dalton*, 818.)

### MARRIAGE AND DIVORCE.

#### 1. COMMON-LAW MARRIAGE — DISABILITY OF ONE PARTY—CONTINUED COHABITATION.—

Where an attempted marriage is void by reason of the disability of one of the parties, a subsequent marriage will be presumed after the disability has been removed, where the matrimonial relationship is continued, and the parties hold themselves out, and are regarded and treated by their relatives and friends, as husband and wife. (*Barker v. Valentine*, 578.)

#### 2. MARRIAGE AND DIVORCE—VESTED RIGHT TO DIVORCE.—

The right to a divorce is not a vested right. (*Allen v. Allen*, 135.)

#### 3. MARRIAGE AND DIVORCE—REFORMATION OF DEFENDANT PENDENTE LITE.—

Conditions justifying divorce must be found to exist at the very time when the divorce is granted. Hence evidence of the temperate habits or condition of defendant subsequent to the commencement of an action for divorce on the ground of habitual intemperance is admissible to destroy plaintiff's right to divorce. (*Allen v. Allen*, 135.)

#### 4. MARRIAGE AND DIVORCE—FOREIGN JUDGMENT—COMITY.—

A valid decree rendered in a foreign country, permit-



ting the guardian of an incompetent husband to maintain an action for divorce against his wife, must, by comity, be given full force and effect in the courts of this country. (*McGrew v. Mutual Life Ins. Co.*, 20.)

5. **MARRIAGE AND DIVORCE—CONSTRUCTION OF FOREIGN STATUTE.**—The construction given by the courts of a foreign country to a statute thereof permitting an action for divorce to be maintained by the guardian of an incompetent person cannot be assailed to defeat a judgment of divorce granted thereunder. (*McGrew v. Mutual Life Ins. Co.*, 20.)

6. **MARRIAGE AND DIVORCE—FOREIGN STATUTE FORFEITING PROPERTY RIGHTS.**—A statute of a foreign country declaring that if divorce is decreed for the adultery of a wife her husband shall hold her separate estate forever, has no operation until the entry of the judgment of divorce. (*McGrew v. Mutual Life Ins. Co.*, 20.)

7. **MARRIAGE AND DIVORCE—FOREIGN DECREE—EFFECT ON PROPERTY RIGHTS—DOMICILE OF WIFE.**—Although a wife may be bound by a decree of divorce rendered in a foreign country, yet if such decree does not purport to determine any property rights, and she is domiciled in another country prior to its rendition and entry, a statute of such foreign country declaring a forfeiture of her personal property to her husband does not operate in the country of her domicile to forfeit to her husband a policy of insurance payable to her, and, at the time of the decree governed by the law of her domicile. (*McGrew v. Mutual Life Ins. Co.*, 20.)

8. **MARRIAGE AND DIVORCE—DOMICILE OF WIFE.**—If a husband discards his wife by instituting proceedings for divorce, the theoretical unity of husband and wife is dissolved, her domicile ceases to be that of the husband, and she may acquire another and separate domicile by a change of residence. (*McGrew v. Mutual Life Ins. Co.*, 20.)

See Wills, 6-8.

## MASTER AND SERVANT.

1. **MASTER AND SERVANT—LIABILITY FOR INDEPENDENT TORTS.**—A master is not liable for the independent tortious acts of his servants, committed with his machinery, but not done in his business nor in the course of the employment of his servants. (*Canton Cotton Warehouse Co. v. Pool*, 620.)

2. **MASTER AND SERVANT—LIABILITY FOR PRACTICAL JOKE.**—A master is not liable for the results of a practical joke committed by his servants on a stranger, wholly outside the course of their employment. (*Canton Cotton Warehouse Co. v. Pool*, 620.)

3. **MASTER AND SERVANT—LIABILITY FOR SERVANT'S TORT.**—A CORPORATION is answerable for the torts of its servants in the same cases, and in the same manner and form of action, as other masters. (*Central of Georgia Ry. Co. v. Brown*, 250.)

4. **MASTER AND SERVANT—LIABILITY FOR WILLFUL TORT.**—A master is liable for the torts of his servant, committed in the course of the servant's employment, though the tort is willful. (*Central of Georgia Ry. Co. v. Brown*, 250.)

5. **MASTER AND SERVANT—WILLFUL TRESPASS—JOINT ACTION.**—A master and servant may be jointly sued in trespass

for a willful wrong committed by the servant within the scope of his employment. (Central of Georgia Ry. Co. v. Brown, 250.)

**6. MASTER AND SERVANT—JOINT TRESPASSERS—STRANGER—VENUE OF ACTION.**—If the conductor of a railroad train undertakes without justification to eject a passenger, and another passenger, voluntarily or at the request of the conductor, joins in the illegal act and thereby commits an assault, the company, the conductor, and the assisting passenger are joint trespassers, who may be sued in one action in the county of the residence of either. (Central of Georgia Ry. Co. v. Brown, 250.)

**7. MASTER AND SERVANT—INJURY TO EMPLOYEE—ACTION AGAINST MASTER—SUFFICIENCY OF COMPLAINT.** When a "derrick boss" sues his employer for injuries caused to him by the breaking of a defective rope connected with the derrick, a complaint showing that the plaintiff was injured while in the performance of his ordinary duties, and while in a place that was unsafe, solely by the defective condition of the rope, and alleging that the defendant had knowledge of the rope's defective condition, but that the plaintiff had not, is sufficient as alleging a cause of action for an injury occasioned through the defectiveness of the rope. (Consolidated Stone Co. v. Williams, 278.)

**8. MASTER AND SERVANT—ACTION AGAINST MASTER—AVERMENTS IN COMPLAINT—WHEN NOT INCONSISTENT.**—An allegation in a complaint for personal injuries received in a stone quarry, by the breaking of a defective rope attached to a derrick, that the plaintiff was a "derrick boss" in the quarry, is not inconsistent with a general averment on his part of a want of knowledge of any defect in the rope. (Consolidated Stone Co. v. Williams, 278.)

**9. MASTER AND SERVANT—ACTION AGAINST MASTER—DEFECTIVE APPLIANCES—WHAT PLAINTIFF NEED NOT PLEAD.**—In an action brought by an employé against his employer, for personal injuries caused by the breaking of a defective rope connected with a derrick, the plaintiff need not allege that he had inspected the rope, or that he had not had an opportunity to inspect it, or that he could not have learned of its defectiveness by the exercise of ordinary care and diligence. (Consolidated Stone Co. v. Williams, 278.)

See Contracts, 2-6.

### MECHANIC'S LIEN.

**1. MECHANICS' LIENS ON APPURTENANCES.**—An artesian well bored as an adjunct to a house, though not physically connected therewith, if essential to its convenient use, is an appurtenance thereto for which a mechanic's lien may be filed and enforced. (Balch v. Chaffee, 155.)

**2. MUNICIPAL CORPORATIONS—MECHANICS' LIENS.**—On grounds of public policy, the mechanic's lien laws do not, in the absence of express provisions, apply to public buildings erected by states, counties, and towns for public use. (Pittsburg Testing Laboratory v. Milwaukee Electric etc. Co., 948.)

**3. MECHANICS' LIENS—QUASI PUBLIC CORPORATIONS.**—Under a general mechanic's lien law, no lien attaches to a particular part of a railroad, or property of any other quasi public corporation, essential to its operation and maintenance for public purposes. (Pittsburg Testing Laboratory v. Milwaukee Electric etc. Co., 948.)

**4. MECHANICS' LIENS, WHEN ENFORCED—QUASI PUBLIC CORPORATIONS.**—Under the general language of a mechanic's lien law, a lien may be enforced against such structures and property of a railway or other quasi public corporation as are not essential to the operation and maintenance of the railway or other business for the public purposes for which it was established. (*Pittsburg Testing Laboratory v. Milwaukee Electric etc. Co.*, 948.)

**5. MECHANICS' LIEN—STREET RAILWAY AND ELECTRIC LIGHT COMPANY.**—A contractor may enforce a mechanic's lien against a new power-house of a street railway and electric light company, where it is admitted that such power-house is not essential to the operation and maintenance either of the company's street railway or of the electric light plant for the public purposes for which the company was established. (*Pittsburg Testing Laboratory v. Milwaukee Electric etc. Co.*, 948.)

### MERGER.

See Judgments, 6-9; Mortgages, 5.

### MISTAKE.

**MISTAKE OF FACT—RELIEF.—EQUITY** will grant relief against a mistake of fact only when it is of such a nature that it could not, by reasonable diligence, have been avoided at the time, but relief will not be given against the results of inexcusable negligence. (*Woodside v. Lippold*, 267.)

### MONOPOLY.

**MONOPOLY—PUBLIC POLICY.**—The creation or encouragement of a monopoly is against public policy. (*Hudspeth v. Hall*, 200.)

See Contracts, 7, 8.

### MORTGAGES.

**1. MORTGAGES OF PROPERTY NOT IN POTENTIAL EXISTENCE.**—A mortgage on clay in the bank in its natural state, not severed or set apart in any manner, and upon the brick to be manufactured therefrom, is a mortgage upon property not having a potential existence, and is ineffectual to create a lien on the brick not manufactured nor in existence when the mortgage was executed. (*Townsend Brick etc. Co. v. Allen*, 388.)

**2. MORTGAGES TO SECURE FUTURE ADVANCES—VALIDITY AS AGAINST SUBSEQUENT ENCUMBRANCERS.**—As against subsequent encumbrancers, who may take without other notice than that given by the records, future advances cannot be secured by mortgage which does not show any agreement to make them, nor name the amount to which they may be made. No duty of inquiry, in such case, rests upon the subsequent encumbrancer, who in good faith, and in ignorance that such advances have been in fact made, gives credit to the mortgagor in reliance on his title to the equity of redemption, and obtains a lien upon it for his security. (*Balch v. Chaffee*, 155.)

**3. MORTGAGE LIEN—RENTS AND PROFITS OF PROPERTY—DEPRECIATION.**—A senior lienholder, whose claim is secured by property which, by depreciation in value after the debt was contracted, becomes worth less than the debt, has an equitable claim upon the rents and profits of such property so far as needed to pay his debt. (*Wilkins v. Gibson*, 204.)



**4. MORTGAGE LIEN—ENFORCING—RENTS—PLEADING—AMENDMENT.**—One who seeks to enforce a mortgage lien against property, which through depreciation has become worth less than the debt, may amend his complaint so as to claim the rents and profits of such property, and such amendment does not add a new cause of action. (*Wilkins v. Gibson*, 204.)

**5. MORTGAGES—CANCELING SATISFACTION—MERGER.**—Where a mortgagee takes a conveyance of the mortgaged premises, the mortgages not being canceled, and subsequently conveys to one who takes no assignment of the mortgages, and who requests that the mortgages be satisfied and canceled of record, in order to clear the record of liens against the property, an unequivocal intention is expressed that the mortgages should no longer exist, but should merge in the title, and equity will not restore the liens of the mortgages in order to give them priority over an intervening mortgage. (*Woodside v. Lippold*, 267.)

**6. MORTGAGES—HOMESTEAD—FORGED SIGNATURE.**—If a husband executes a mortgage on his lands, including his homestead, and forges the signature of his wife thereto, without the knowledge of the mortgagee, the mortgage is valid as to any excess of land over and above the homestead. (*North American Trust Co. v. Lanier*, 635.)

**7. MORTGAGES—HOMESTEAD—FORGED SIGNATURE—PURCHASE MONEY LIEN.**—If a husband executes a mortgage on all of his lands, including his homestead, forging the name of his wife thereto without the knowledge of the mortgagee, partly to secure the purchase money debt, satisfied by the mortgagee, and partly for borrowed money, the mortgage binds all of the lands in so far as it secures the purchase money debt, and binds the land in excess of the homestead for the money otherwise borrowed. (*North American Trust Co. v. Lanier*, 635.)

**8. MORTGAGES—HOMESTEAD—SUBROGATION.**—If a husband executes a mortgage on all of his land, including his homestead, partly to obtain money to pay a purchase money debt, the mortgagee by taking up and holding the note for such purchase money debt is entitled to be subrogated to all of the rights of the original holder thereof, as against all of the land, including the homestead. (*North American Trust Co. v. Lanier*, 635.)

**9. MORTGAGE—FORECLOSURE—COMPLAINT—SUFFICIENCY OF.**—In a suit to foreclose a mortgage, the complaint shows a good cause of action and will support a decree, although it neither sets up the mortgage by copy or exhibit, nor states the substance or purport of its provisions, where such objection is not made until after issue joined, and where the complaint sets out in full the note sued on, its ownership and nonpayment, and the fact that it is secured by a regularly recorded mortgage on certain described land. (*Washington Investment Assn. v. Stanley*, 793.)

**10. ACTIONS—PLEADINGS—MORTGAGES—FORECLOSURE.**—In an action on a note secured by mortgage, the plaintiff is compelled by the statute to set up the mortgage, unless the defendant waives the privilege of insisting upon the statute. (*Frost v. Witter*, 53.)

**11. MORTGAGES—LIEN OF—WHEN NOT BARRED AS TO MORTGAGOR.**—Although the lien of a mortgage is barred and extinguished as to the grantee of the mortgagor through the mortgagee's negligence, the obligation of the mortgage is not thereby extinguished as to the mortgagor, if the right of action is not

barred as to him, and judgment may be taken against him on the principal obligation. (*Frost v. Witter*, 53.)

See Homesteads, 2, 4; Husband and Wife, 2; Taxation, 1.

### MUNICIPAL CORPORATIONS.

**1. MUNICIPAL CORPORATIONS—APPROACH TO BRIDGE—ADDITIONAL SERVITUDE—FIXING STREET GRADE—ABUTTING OWNERS.**—When the legislature grants a franchise to a company to build a bridge across a river, to connect streets on each side thereof, the ends of the bridge being above the streets which it connects, and one of the approaches to the bridge is so constructed, under legislative authority, that it practically occupies the whole street along which it runs from a certain cross-street to the river, and constitutes an elevated roadway above the original surface of the street, the structure does not constitute an additional servitude, but is merely an establishment of the grade upon that part of the street occupied by the approach, and which invades no private right of an abutting owner, though it interferes with access to his lots. (*Brand v. Multnomah County*, 772.)

**2. THE STATE HAS POWER TO FIX OR CHANGE THE GRADE OF STREETS** and public highways within the corporate limits of cities and towns, although it has previously delegated to such municipalities the requisite authority to do so. (*Brand v. Multnomah County*, 772.)

**3. PUBLIC STREETS CANNOT BE BURDENED WITH ANY ADDITIONAL SERVITUDE**, other than that which properly and legitimately attaches to them as public streets and highways, without just compensation being made to the abutting lot owner. (*Brand v. Multnomah County*, 772.)

**4. MUNICIPAL CORPORATIONS—CHANGE OF STREET GRADE—DAMAGES—LIABILITY.**—A municipality is not answerable in damages for injuries resulting from the establishment of, or a change in, street grades, unless specially required to respond by some constitutional, statutory, or charter provision. (*Brand v. Multnomah County*, 772.)

**5. NEGLIGENCE—CONTRIBUTORY—UNSAFE STREET—LIABILITY OF CITY.**—A traveler who knowingly and deliberately takes the risk of driving over a defective portion of a street, which a city has negligently failed to put in safe condition, cannot recover for injuries sustained, where the danger is so plain and obvious that driving over the place in question, in and of itself, amounts to a want of ordinary care and diligence. (*Columbus v. Griggs*, 257.)

**6. NUISANCE.**—A MUNICIPAL CORPORATION is no more exempt from liability in case it creates a nuisance, either public or private, than an individual. (*Winchell v. Waukesha*, 902.)

**7. MUNICIPAL CORPORATIONS—POLLUTING WATERS.**—Legislative authority to install a sewer system carries no implication of authority to create or maintain a nuisance, whether it results from negligence or from the plan adopted. (*Winchell v. Waukesha*, 902.)

**8. MUNICIPAL CORPORATIONS—SPECIAL DAMAGE FOR NUISANCE.**—Where a defendant city creates and maintains a nuisance which causes special and private damage to a plaintiff, he is entitled to the same remedies as if the defendant were a private individual. (*Winchell v. Waukesha*, 902.)

**9. INJUNCTION AGAINST DISCHARGING SEWAGE BY MUNICIPAL CORPORATIONS.**—In a suit to enjoin a city from maintaining a nuisance by discharging sewage into a stream, it is material whether such action would destroy the sewer system and subject the citizen to serious inconvenience. Hence evidence is admissible tending to show that the sewer system might be equipped with apparatus which would deodorize and render innocuous the outflow. (*Winchell v. Waukesha*, 902.)

**10. JUDGMENT—ENJOINING NUISANCE—MEANING OF "SEWAGE."**—Where a judgment restrains a city from discharging sewage through its sewer system after a certain date, the term "sewage" is intended to mean refuse matter in such condition and manner as to create a nuisance. (*Winchell v. Waukesha*, 902.)

**11. MUNICIPAL CORPORATIONS—REMOVING TREES FROM STREET.**—While an abutting owner has the title to shade trees in the street adjoining his premises, the municipality may, when the public necessities call for such action, require such shade trees to be removed. (*Stretch v. Cassapolis*, 567.)

See *Mechanics' Lien*, 1; *Negligence*, 5.

## MURDER.

See *Homicide*.

## NEGLIGENCE.

**1. NEGLIGENCE OF DRIVER WHEN ATTRIBUTED TO PASSENGER.**—The hirer of a team and driver is himself guilty of contributory negligence, if he fails to check or remonstrate with the driver, when the latter attempts to cross the railroad track in open view, without stopping or listening for approaching trains. (*Illinois Central R. R. Co. v. McLeod*, 630.)

**2. NEGLIGENCE, CONTRIBUTORY.**—The negligence of a railroad company in failing to give a signal of warning at a crossing does not avail a person to recover when he is injured through want of ordinary care in attempting to cross the railroad track. (*Illinois Central R. R. Co. v. McLeod*, 630.)

**3. NEGLIGENCE, CONTRIBUTORY—VIOLATION OF LAW.** Contributory negligence cannot be based on knowledge by a person injured that the person inflicting the injury habitually violates the law, and should be expected to continue to violate it. (*Hasie v. Alabama etc. Ry. Co.*, 632.)

**4. NEGLIGENCE—CONCURRING CAUSES OF INJURY—LIABILITY.**—The fact that some other cause operated with the negligence of a defendant in producing an injury does not relieve him from liability, where such other cause would not have produced the injury but for the defendant's negligence. (*Knouff v. Logansport*, 292.)

**5. NEGLIGENCE—INJURY AT BRIDGE IN CITY FROM JUMPING TO AVOID A BICYCLE—WANT OF GUARDS—PROXIMATE CAUSE.**—It is the duty of a city to maintain guards at the abutment of a bridge connecting with a street, where there is an embankment rendering the place unsafe without guards, and its failure to do so is negligence. Hence, if a pedestrian on a sidewalk near the entrance to the bridge is suddenly confronted with a bicycle, coming at great speed, and jumps to one side to avoid a collision, but falls down the embankment and is injured, the failure to maintain guards at the place is a proximate cause of the injury, for



which the city is answerable, although a concurring cause of the injury was the unlawful act of the bicyclist in riding on a sidewalk of the bridge. (*Knouff v. Logansport*, 292.)

See Railroads.

### NEGOTIABLE INSTRUMENTS.

1. **NEGOTIABLE INSTRUMENTS—PAYEE'S RIGHT TO TRANSFER.**—One who makes a negotiable promissory note and delivers it to another is charged by the law with notice that the payee of the note has a right to transfer it by sale or otherwise to whomsoever he may see proper. (*Bank of Forsyth v. Davis*, 248.)

2. **EVIDENCE—ASSIGNED NOTE.**—The admission of an assigned note in evidence against its maker, as to whom it is not barred, is not error, although the assignment thereof is not dated. All objection to such assignment is waived when it is not urged that it was not made before the commencement of the suit. (*Frost v. Witter*, 53.)

3. **NEGOTIABLE INSTRUMENTS—EQUITABLE ASSIGNMENT.**—If a note is made payable to the cashier of a bank, and presumably to its use, upon his ceasing to be connected with the bank there is an equitable assignment of the note to the bank, and any subsequent formal assignment must relate to the time of the equitable assignment. (*Frost v. Witter*, 53.)

4. **NEGOTIABLE INSTRUMENTS—DISHONOR OF BY NON-PAYMENT OF INTEREST.**—A note is not dishonored, by reason of a failure to pay interest prior to the maturity of the principal, in the absence of a stipulation to that effect as it fell due. (*United States Nat. Bank v. Floss*, 752.)

5. **NEGOTIABLE INSTRUMENTS—DEFENSE.—THE BREACH OF AN EXECUTORY CONTRACT,** such as a bond for a deed, which forms the consideration for a negotiable promissory note, is not a defense, in whole or in part, against an indorsee who took the note for value before maturity, though he had notice of the contract, unless he was also informed of the breach before its purchase. (*United States Nat. Bank v. Floss*, 752.)

6. **NEGOTIABLE INSTRUMENTS—PERSONAL LIABILITY OF ATTORNEY IN FACT.**—A person who signs a note in the name of another, by himself as attorney in fact, with the knowledge of the payee, and subsequent indorsee that he has no authority to use such other's name, and who refuses to assume personal responsibility by signing his own name, is not liable on the note as his contract, although it is given in a transaction of his own, and he generally uses the name signed to the note as trade name. (*Kansas Nat. Bank v. Bay*, 417.)

7. **CHECKS FOR MONEY WON AT GAMING—INVALIDITY OF.**—Under the statute of Indiana, a check given for money won at playing cards is void in the hands of a bona fide holder for value. (*Irwin v. Marquett*, 297.)

8. **NEGOTIABLE INSTRUMENTS—ILLEGAL CONSIDERATION—RATIFICATION.**—A note given in consideration of money won from the maker by the payee on the result of a wager is a contract prohibited by statute, and is absolutely void. It cannot, therefore, be ratified without a new and valid consideration to support it. (*Pritchett v. Aherns*, 274.)

See Estoppel, 2.

## NEWSPAPER.

**NEWSPAPER, WHAT IS NOT FOR THE PURPOSE OF PUBLISHING LEGAL NOTICES.**—"A real estate and rental guide," which, as its name imports, is taken up largely with transactions concerning real property and has never been employed as a medium for advertising notices of mortgage sales or other legal notices, is not such a newspaper as is contemplated by a power of sale contained in a mortgage of real estate, and a purchaser under a notice published in such guide will not be compelled to perform his contract. (*Crowell v. Parker*, 815.)

## NEW TRIAL.

**1. NEW TRIAL.—NEWLY DISCOVERED EVIDENCE** which is merely cumulative, or designed to contradict a witness, is not ground for a new trial. (*Chalmers v. Sheehy*, 62.)

**2. NEW TRIAL.—ACCIDENT OR SURPRISE**, growing out of enforced changes of counsel during the progress of the case, is not ground for the reversal of an order denying a new trial when it does not appear that there has been any miscarriage of justice nor abuse of discretion. (*Chalmers v. Sheehy*, 62.)

## NOTICE.

See Newspaper.

## NUISANCE.

**1. NUISANCE—ABATEMENT—COMPENSATION.**—The abatement of a nuisance is not such a taking of private property as to require compensation to be made therefor. (*State v. Meek*, 342.)

**2. NUISANCE—CONSTRUCTION OF STATUTE.**—If a statute provides, first, that the owner of any dam shall construct within a reasonable time a fishway therein, and second, that a dam without a fishway is a nuisance which may be abated, an information thereunder naming the offense charged as maintaining a nuisance and in describing it stating that defendants maintained a dam over which they failed to construct within a reasonable time and maintain a fishway, confers jurisdiction upon the court to try defendants for maintaining a nuisance. The first and second sections of the statute should be construed together, as creating one offense, and that the maintaining of a nuisance. (*State v. Meek*, 342.)

**3. NUISANCE—JURISDICTION OF JUSTICE—CONSTRUCTION OF STATUTE.**—If one statute declares a dam without a fishway to be a nuisance which may be abated, while another statute provides that a penalty of one thousand dollars may be imposed for maintaining a nuisance when no other punishment therefor is specifically provided, a justice of the peace has jurisdiction to try for the offense of maintaining a dam without a fishway, to declare it a nuisance, and to order its abatement, although the penalty which may be imposed exceeds his jurisdiction. (*State v. Meek*, 342.)

**4. NUISANCE—JOINDER OF PARTIES IN SUITS TO ABATE.**—WHERE THE OWNERS OF SEPARATE PARCELS OF REAL PROPERTY situate in the same neighborhood are all injured in the same manner by an alleged nuisance, they may join in a suit to restrain its continuance. (*Whipple v. Guile*, 855.)

See Municipal Corporations, 6-10.

## OBSCENE LITERATURE.

**1. OBSCENE LITERATURE—GIST OF OFFENSE.**—Under a statute making it a penal offense to sell, offer for sale, lend or give, a paper principally made up of criminal news, police reports, and pictures and stories of lust, bloodshed, and crime, the gist of the offense is the massing of these immoralities in one publication for circulation, and demands that the paper shall be principally devoted to the publication of such material. The law cannot be evaded by intermingling other material, whether for the purpose of evasion or of securing attention to the main subject matter, so long as the principal resulting effect is the circulation of this massed immorality. It is for the jury to determine whether the papers in evidence were thus devoted to the publication of material claimed to be within the statutory description. (*State v. McKee*, 124.)

**2. PLEADINGS—COMPLAINT ON OBSCENE LITERATURE.** A complaint, under a statute prohibiting the sale or giving away of publications principally devoted to the publication of criminal news, police reports, or pictures, or stories of deeds of bloodshed, lust, and crime, is sufficient, if the offense is charged in the words of the statute. (*State v. McKee*, 124.)

## OFFICERS.

**1. OFFICER, WHO IS NOT.**—A person who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties, and exercises no powers depending directly on the authority of law, but simply performs such duties as are required of him by the persons appointing him, and whose responsibility is limited to them, is an employé, and not an officer, and does not hold an office. (*Mayor v. Lyman*, 524.)

**2. OFFICER, WHO IS NOT.**—A SUPERINTENDENT of public instruction legally appointed by a board of school commissioners, who takes no official oath, gives no official bond, has no commission issued to him, no fixed or definite tenure of office, but holds at the pleasure of such board, having and exercising no power except what is derived from and through such board, is simply an employé or agent thereof, and is not an officer, nor within the requirement of a city charter that all municipal officers shall be registered voters of the city. (*Mayor v. Lyman*, 524.)

**3. OFFICER—WATCHMAN.**—THE TERM "POLICEMAN" is the legal equivalent of "watchman." (*State v. Evans*, 669.)

**4. OFFICE AND OFFICERS—JUSTICE OF PEACE—POLICE JUDGE.**—Although the same person is prohibited from holding both the offices of justice of the peace and of police judge, yet if the police judge is absent, sick, or disqualified from acting, such justice may temporarily act as police judge until such absence or disqualification cease. (*In re Corum*, 382.)

**5. OFFICERS DE FACTO—COLLATERAL ATTACK.**—The acts and judgments of a de facto officer holding a de facto court are not void, and his title or right to the office is not subject to collateral attack. (*In re Corum*, 382.)

**6. OFFICERS—LIABILITY OF SURETIES.**—For false imprisonment, of which their principal is guilty, the sureties on his official bond are answerable. (*State v. McDaniel*, 618.)

See Arrest; Constitutional Law, 2-5; Judgments, 10, 11.



**OFFICER'S RETURN.**

See Judgments, 10, 11; Sheriff's Return.

**PARDONS.**

1. **PARDONS—CONVICTION—EXCEPTIONS BEFORE SENTENCE.**—Where the governor is authorized by the constitution to grant pardons after conviction, a pardon may be granted after conviction and before sentence while a review by the supreme court is pending on exceptions, as the acceptance of the pardon by the defendant is an admission of guilt and a waiver of his exceptions. (*People v. Marsh*, 584.)

2. **PARDONS—ADVISORY BOARD—POWER OF GOVERNOR.**—Where the statute makes no such requirement, the creation of an advisory board of pardons does not require all petitions for pardon to be presented to and acted upon by such board before the governor can exercise executive clemency. (*People v. Marsh*, 584.)

3. **PARDONS—CONDITIONAL—POWER OF GOVERNOR.**—Under a constitutional authority to grant pardons upon such conditions as he may think proper, the governor may lawfully issue a pardon upon the condition that the convicted person shall pay a certain sum of money to the state to reimburse it for the expenses incurred in his trial. (*People v. Marsh*, 584.)

**PARENT AND CHILD.**

**PARENT AND CHILD—ILLEGITIMATES—RIGHT TO RECOVER FOR INJURY TO.**—Statutory rights of action given kindred for injuries do not embrace illegitimate kindred, without express mention. (*Alabama etc. Ry. Co. v. Williams*, 624.)

**PARTITION.**

1. **PARTITION — PROOF — ACQUIESCENCE FOR SIXTY YEARS.**—Recitals in deeds, possession and occupation of land, improvements made thereon for a long series of years, and acquiescence for sixty years, furnish sufficient evidence that there was an actual partition of the land either by deed or by proceedings in the probate court, which have been lost and were not recorded. (*Hunt v. Rabitoay*, 563.)

2. **PARTITION OF LANDS BY THE GUARDIANS OF INFANTS AND INCOMPETENTS** will be sustained so long as no advantage is taken and the partition is equal. (*Hunt v. Rabitoay*, 563.)

3. **PARTITION SALE—TITLE ACQUIRED BY PURCHASERS.**—The purchasers at a sheriff's sale under a decree in a partition suit acquire only the title which the parties to the suit had. (*Smoot v. Judd*, 738.)

See Appeal, 1; Judgments, 15.

**PATENTS.**

**PATENTS—SALE OF RIGHTS—NOTE GIVEN FOR—DEFENSE.**—A STATUTE relating to the sale of patent rights, which, among other things, requires the words "given for a patent right" to be inserted in any obligation taken therefor, relates to the sale of the intangible right secured by the letters patent, and not to articles manufactured under the patent. Hence, if the patentee

transfers the exclusive right and privilege of selling for use a certain article for which he claims to have a patent, and takes a note therefor, it is no defense to an action thereon that the note does not contain the words quoted, or that other acts prescribed by the statute have not been performed. (*People's State Bank v. Jones*, 310.)

## PLEADING.

1. **PLEADINGS—INSUFFICIENCY OF ANSWER.**—An allegation by a defendant that he has no knowledge or information sufficient to form a belief as to his execution of a written instrument in suit does not comply with a statute requiring him, if he intends to controvert the execution of such instrument, to deny it specifically. In such case the plaintiff need not prove the alleged execution of the instrument. (*Garland v. Gaines*, 182.)

2. **TRESPASS AND CASE—JOINDER OF ACTIONS.**—Under the system of code pleading, the distinction between trespass and trespass on the case has been abolished, and the two may be joined in one action. (*Central of Georgia Ry. Co. v. Brown*, 250.)

3. **PLEADING—AMENDMENT—CHANGE OF REMEDY.**—An amendment to a pleading, not changing the "obligation" sought to be enforced, and only calling for an additional remedy, does not change the "cause of action." (*Frost v. Witter*, 53.)

4. **PLEADING—AMENDMENT—MORTGAGES.**—An amendment of a complaint in an action upon a note so as to set up a mortgage given as security for the note, and to seek its foreclosure, should be allowed. Such amendment does not wholly change the original cause of action, but merely cures a statutory defect in the complaint, and gives the plaintiff an additional remedy to enforce the obligation of the note. (*Frost v. Witter*, 53.)

5. **PLEADINGS—AMENDMENT—STATUTE OF LIMITATIONS.**—If an amendment to a complaint does not change the cause of action, the trial to which the statute of limitations runs is the filing of the original complaint. (*Frost v. Witter*, 53.)

6. **PLEADING—AMENDMENTS—LIMIT TO RIGHT.**—All that is required in allowing amendments to pleadings is, that a wholly different cause of action, entirely foreign to the original, cannot be introduced thereby, and that a party cannot be allowed to strike out the entire substance and prayer of his pleading, and insert a new case by way of amendment. (*Frost v. Witter*, 53.)

7. **THE ASSIGNMENT OF A CLAIM PENDING SUIT THEREON REQUIRES** no alteration or amendment of the complaint, but only an application for a change of parties, and a prima facie right in the assignee is enough to justify an order for his substitution as a party plaintiff. (*Fish v. Smith*, 161.)

8. **EQUITY PLEADING—COMPLAINT.**—In a suit to obtain equitable relief, a complaint is sufficient which shows irreparable injury which is continuously and constantly recurring, and that any remedy obtainable in a court of law would be inadequate. (*Winchell v. Waukesha*, 902.)

9. **EQUITY PRACTICE—A MOTION TO DISMISS A BILL FOR MISJOINDER OF PARTIES PLAINTIFF MAY BE MADE AFTER** an answer has been filed. (*Whipple v. Guile*, 855.)

10. **TRIAL—VARIANCE—WHEN NOT MATERIAL.**—A variance between the complaint and the evidence is not material where it does not mislead in the preparation of a defense. (*Consolidated Stone Co. v. Williams*, 278.)

**11. TRIAL—PLEADING AND PROOF—VARIANCE.**—Where a declaration alleges a contract to employ the plaintiff as a brakeman on a passenger train, at which he had been employed before, and the proof shows that his previous service was as a brakeman on a freight train, the only variance being as to the recital of his former occupation, it is immaterial. (*Sax v. Detroit etc. Ry. Co.*, 572.)

### POISON.

See Criminal Law, 3.

### POLICE POWER.

**THE POLICE POWER OF A STATE MAY BE DEFINED**, for all practical purposes, to be the power of the legislature to make such regulations relating to personal and property rights as look to the public health, public safety, and public morals. While this power is large, it is not without limit, and, like all other powers of the legislature, must be so exercised as not to violate the constitutional rights of the people. (*State v. Dalton*, 818.)

See Constitutional Law.

### POWER OF ATTORNEY.

**1. A POWER OF ATTORNEY TO SELL AND CONVEY** real estate does not include a power to mortgage. (*Minnesota Stoneware Co. v. McCrossen*, 927.)

**2. POWER OF ATTORNEY—INTERPRETATION.**—A written instrument, not ambiguous either in its literal sense or in the application of its language to the subject or purpose thereof, must be taken to mean what it says. (*Minnesota Stoneware Co. v. McCrossen*, 927.)

**3. EVIDENCE, PAROL.**—A POWER OF ATTORNEY TO SELL AND CONVEY REAL ESTATE can no more be extended or changed by parol than can a conveyance of real estate. (*Minnesota Stoneware Co. v. McCrossen*, 927.)

**4. HUSBAND AND WIFE—POWER OF ATTORNEY—CONSTRUCTION OF.**—A husband having a power of attorney from his wife to exercise supervision over all her lands, to sell any part thereof, or any estate, right, title, or interest that she may have therein or thereto, to make partition of any property or estate that she is interested in, and to mortgage any part of her lands or interest therein, is not authorized to mortgage his own land so as to bar her inchoate right of dower therein. (*Security Sav. Bank v. Smith*, 756.)

### RAILROADS.

**1. RAILROADS—UNSIGNED LIMITED TICKETS—BINDING EFFECT OF CONDITIONS—PAROL EVIDENCE TO VARY.**—A printed condition on an unsigned limited round-trip railroad passenger ticket, that, "in consideration of the reduced rate at which this ticket is sold, it is hereby agreed that it will not be good for going passage after midnight of the date named in attached coupon, nor for return passage after midnight of date punched in margin hereof," is reasonable and unambiguous. The acceptance of such ticket and its use, whether such condition is read or not, constitute a contract between the carrier and the passenger, the terms of which cannot be varied or contradicted by parol evidence. (*Walker v. Price*, 392.)



**2. RAILROADS—UNSIGNED LIMITED TICKETS—EFFECT OF CONDITIONS.**—Want of the signature of the purchaser on a limited round-trip passenger ticket does not relieve him from an observance of a printed condition thereon requiring the ticket to be used for return passage before the date punched in the margin thereof. (*Walker v. Price*, 392.)

**3. RAILWAYS—NEGLIGENCE.—THE FAILURE TO RING THE ENGINE-BELL** of an approaching train is not such negligence as contributes to a resulting injury, where the person injured was fully aware of the approach of the train by hearing its whistle and seeing its headlight. (*Hutchinson v. Missouri Pac. Ry. Co.*, 710.)

**4. RAILWAYS—NEGLIGENCE — SPEED — ORDINANCE.**—It is negligence per se to run a train at a rate of thirty-five miles an hour in a city in violation of an ordinance prohibiting a speed of more than six miles an hour. (*Hutchinson v. Missouri Pac. Ry. Co.*, 710.)

**5. RAILWAYS — NEGLIGENCE—PRESUMPTION.—WHERE A CITY ORDINANCE** limits the speed of a railway train, the law will presume, in the absence of proof to the contrary, that one crossing a railroad track acted upon the assumption that an approaching train was running at a speed not in excess of the prohibited rate. (*Hutchinson v. Missouri Pac. Ry. Co.*, 710.)

**6. RAILWAYS — NEGLIGENCE—CONTRIBUTORY—QUESTION FOR JURY.**—Where a railroad company is guilty of negligence per se, and there is some evidence that the person injured was also negligent, it is for the jury whether the negligence of the person injured is such as will preclude a recovery. (*Hutchinson v. Missouri Pac. Ry. Co.*, 710.)

**7. NEGLIGENCE, CONTRIBUTORY — KNOWLEDGE OF VIOLATION OF LAW BY RAILROAD COMPANY.**—Knowledge by a person that a railway company habitually runs its trains at an excessive rate of speed, in violation of law, does not render him guilty of contributory negligence, merely because he does not act upon the assumption that the train by which he is injured would be so run. (*Hsieh v. Alabama etc. Ry. Co.*, 632.)

**8. STREET RAILROADS—REMOVAL OF SHADE TREES—DAMAGES.**—A street railroad company has the right to remove shade trees within the limits of the public highway, for the construction of its road as established by the township authorities, without compensation for damages. (*Miller v. Detroit etc. Ry.*, 569.)

**9. STREET RAILROADS—REMOVING TREES—NOTICE.**—NEITHER A MUNICIPALITY nor a street railroad company has the right to remove shade trees without notice to the owner, and an opportunity given to him to remove them as he may see fit. (*Miller v. Detroit etc. Ry.*, 569.)

**10. RAILROADS—GENERAL SUPERINTENDENT—RATIFICATION OF CONTRACT OF EMPLOYMENT.**—The authority of the general superintendent of a railroad company to ratify an offer of employment made by a train master, in settlement of a claim for personal injuries, and a completion of the contract, will be presumed in the absence of proof to the contrary. (*Sax v. Detroit etc. Ry. Co.*, 572.)

**See Carriers; Eminent Domain.**

**REMAINDERMEN.**

See Estates.

**REPLEVIN.**

1. **REPLEVIN WILL NOT LIE** for an undivided interest in personal property. (Sharp v. Johnson, 788.)

2. **REPLEVIN BY CO-OWNER—RETURN OF PROPERTY.**—When one co-owner's undivided interest in personal property is attached, the fact that the property, at the time of the attachment, was in the possession of the other owner does not entitle the latter, in a replevin suit, to a return of the property taken. (Sharp v. Johnson, 788.)

3. **REPLEVIN — WRIT — ABBREVIATIONS — PAROL EVIDENCE.**—Where goods are described in a writ of replevin by abbreviations which have a well-known and settled meaning to the trade, but which are not in such common use as to make them the subjects of judicial notice, parol evidence is admissible to explain their meaning. (Dages v. Brake, 556.)

See Appeal, 6.

**REPORTERS.**

See Appeal, 11.

**RES JUDICATA.**

See Judgments, 2-5.

**RESTRAINT OF MARRIAGE.**

See Wills, 6-8.

**RESTRAINT OF TRADE.**

See Contracts, 7, 8.

**REVENUE STAMPS.**

See Internal Revenue.

**REWARDS.**

1. **REWARDS—ACTION FOR—KNOWLEDGE OF OFFER NOT ESSENTIAL.**—When a reward is offered for the return of stolen property, the one who returns it can sustain an action for the reward, without alleging in the complaint that his services were rendered with a knowledge of the reward offered, and in consideration of the offer. (Everman v. Hyman, 284.)

2. **REWARDS—"CAPTURE" OF THIEF—GIVING INFORMATION IS NOT.**—One is not entitled to a reward for the "capture" of a thief simply because he has informed an officer where the thief can be found, although the officer goes at once and makes an arrest. A reward offered for a "capture" is not a reward offered for information. (Everman v. Hyman, 284.)

3. **REWARDS—PUTTING OWNER INTO POSSESSION BEFORE ACTION.**—One who sues to recover an unpaid reward for the "return" of a stolen horse is not obliged, before bringing suit, to put the owner in possession of the animal. Hence, there is no

error, in such an action, for the court to refuse to submit to the jury an interrogatory as to whether the plaintiff did do so. (*Everman v. Hyman*, 284.)

SALES.

**SALES, CONDITIONAL—CONFLICT OF LAWS.**—The law of the state in which a conditional sale is to be performed, or is to have its beneficial effect and operation, rather than the law of the state in which it is made, must determine its validity as between the purchaser and his attaching creditors. (*Beggs v. Bartels*, 152.)

• See Attachment, 2.

SHERIFF'S RETURN.

**1. SHERIFF'S RETURN — AMENDMENT.**—In a suit to set aside a judgment founded on a false return, the court has no right to allow the sheriff to amend his return in the original case. (*Smoot v. Judd*, 738.)

**2. SHERIFF'S RETURN — CONCLUSIVENESS.**—The rule that a sheriff's return is conclusive as between the parties to the suit has no application in a suit in equity to set aside the judgment founded on the return on the equitable ground of fraud, accident, or mistake. (*Smoot v. Judd*, 738.)

**3. SHERIFF'S RETURN—FALSE—REMEDY.**—The fact that by reason of a false return one has a remedy at law by suit on the sheriff's bond does not deprive him of his remedy in equity to vacate the judgment obtained by means of such false return. (*Smoot v. Judd*, 738.)

See Judgments, 10, 11.

STATUTES.

**1. STATUTE—VETOED BILL, WITH EMERGENCY CLAUSE, BECOMES A LAW, WHEN.**—When a bill, with an emergency clause, is vetoed by the governor, it becomes a law, under the constitution of Kentucky, immediately upon its passage over his objections. (*Sinking Fund Commrs. v. George*, 454.)

**2. STATUTES—REPEAL OF, AND ITS EFFECT UPON OFFICE HOLDERS.**—When a law, under which persons hold office at the legislative will, is repealed, their right to office ceases. (*Sinking Fund Commrs. v. George*, 454.)

**3. STATUTES—CONCLUSIVE EVIDENCE OF PASSAGE—COLLATERAL IMPEACHMENT—RESORT TO JOURNALS.** The validity of a statute, duly certified, approved, enrolled, and deposited in the office of the secretary of state, is conclusively presumed to have been properly passed, and cannot be impeached by a resort to the journals of the legislature to show that it did not receive the concurrence of a majority of the members thereof as required by the constitution. (*County of Yolo v. Cogan*, 41.)

**4. STATUTES—PASSAGE OF—FUNCTION OF LEGISLATURE.**—A constitutional mandate that the yeas and nays, upon the passage of a bill, shall be entered upon the journals of the legislature, does not change the rule that it is the exclusive function of the legislature to determine by proper authentication that the bill has been properly passed. The power to determine whether these formalities have been complied with is necessarily vested in the legislature alone, since otherwise, it would be powerless to enact a statute. (*County of Yolo v. Cogan*, 41.)



**5. STATUTES—REPEAL.**—Statutes authorizing county officers to collect and withhold from the state commissions for the collection of the revenue of the state, and providing that all fees or commissions allowed to, or received by, county officers for such services shall be paid into the county treasury and apportioned to the salary fund, are repealed by a later statute abolishing all commissions or fees paid by the state to the officers of any county for services in the collection of taxes. (County of Yolo v. Coglan, 41.)

**6. STATUTES—REPEAL** of an “abolishing” statute does not revive the statutes abolished by its passage. (County of Yolo v. Coglan, 41.)

See Constitutional Law.

### SUBROGATION.

**1. SUBROGATION—WHEN ARISES.**—Subrogation arises only in those cases where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay, or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor. (Wilkins v. Gibson, 204.)

**2. SUBROGATION — LENDER, WHEN GIVEN A FIRST LIEN.**—One who advances money to pay off an encumbrance upon realty, at the instance of the owner thereof, and upon the express understanding that the advance made is to be secured by the immediate execution of papers which will constitute a first lien on the property, is not a mere volunteer. If the new security is defective, the lender, if not chargeable with culpable negligence, will be subrogated to the rights of the prior encumbrancer under the security held by him, unless the superior or equal equities of others will be prejudiced thereby. (Wilkins v. Gibson, 204.)

**3. SUBROGATION — KNOWLEDGE OF INTERVENING ENCUMBRANCE.**—The fact that one who loans money to satisfy a prior mortgage knows of the existence of an intervening mortgage will not defeat his right to subrogation, if he had an agreement to that effect. (Wilkins v. Gibson, 204.)

**4. SUBROGATION — INTERVENING ENCUMBRANCE — EQUITABLE ESTOPPEL.**—When a prior encumbrance has been canceled of record, and, acting on the faith of this, an intervening encumbrancer has delayed in prosecuting his legal remedies, while these facts do not estop a person advancing money to pay off the prior encumbrance from claiming subrogation, yet if he delays for an unreasonable time to claim the right and have the cancellation set aside, equity will refuse to enforce the right of subrogation. (Wilkins v. Gibson, 204.)

**5. SUBROGATION.—IF A SENIOR MORTGAGE IS PAID OFF BY A JUNIOR MORTGAGEE,** he will, if the payment was necessary for his protection, be subrogated to the rights of the senior encumbrancer. (Wilkins v. Gibson, 204.)

**6. SUBROGATION—ENTIRE DEBT PAID.—TO ENTITLE A JUNIOR MORTGAGEE** to subrogation, the general rule is that the whole debt must be paid and the senior creditor satisfied. (Wilkins v. Gibson, 204.)

**7. SUBROGATION — JUNIOR ENCUMBRANCER PAYING DEBT.**—If the entire prior encumbrance is paid, a junior encum-

brancer is entitled to subrogation to the extent of the amount he contributed, though the balance of the debt is paid by the debtor or by a third person. (*Wilkins v. Gibson*, 204.)

8. **SUBROGATION — WAIVER — ENFORCING SUBSEQUENT MORTGAGE.**—One who advances money to pay a prior encumbrance, and takes a mortgage as security with the understanding that it is a first lien on the property, does not, by suing to enforce his mortgage, waive his right of subrogation, where the necessity of claiming such right was not known until an effort was made to enforce the mortgage. (*Wilkins v. Gibson*, 204.)

9. **SUBROGATION AS AGAINST VOLUNTEERS.**—The right of subrogation passes to innocent assignees in virtue of equity and not of contract, and is of avail to them against all volunteers or mere donees. (*North American Trust Co. v. Lanier*, 635.)

10. **SUBROGATION—JOINDER OF PARTIES—PLEADING.**—One who claims the right of subrogation to the rights of a prior encumbrancer as against an intermediate one, must, to enforce such right, make such prior encumbrancer a party to the action, or allege a sufficient reason for not doing so, and set up the rights of such prior encumbrancer so as to allow others to make proper defenses thereto. (*Wilkins v. Gibson*, 204.)

11. **SUBROGATION—USURY, EFFECT OF.**—The fact that one, who has loaned money to discharge a prior encumbrance, has charged usury, will not deprive him of the right to be subrogated to the rights of the prior encumbrancer, if he had an agreement to that effect, and is not seeking to collect more than the principal and legal interest of his debt. (*Wilkins v. Gibson*, 204.)

### SURETYSHIP.

1. **SURETYSHIP — RELEASE OF SURETY — EXTENDING TIME OF PAYMENT.**—A surety on a promissory note is released, where the payee, without the surety's knowledge or consent, extends the time of payment and takes a note for the accrued interest, which bears interest from its date, for the agreement to thus pay compound interest is a sufficient consideration for the agreement of extension. (*Bugh v. Crum*, 307.)

2. **SURETYSHIP—BREACH OF CONDITION—RELEASE OF SURETY.**—A surety may stipulate for the particular use of a note as a condition to signing it. This condition may be either material or immaterial, but no person who takes it with knowledge can acquire title as against him in violation of the terms imposed. The surety may insist on the strict terms of his agreement, and, if material alteration is made without his consent, notwithstanding it inures to his benefit, he is discharged. (*Crossley v. Stanley*, 321.)

3. **SURETYSHIP—BREACH OF CONDITION—RELEASE OF SURETY.**—If a surety is induced to sign a note by representations of his principal, known to the payee, that the proceeds of the note are to be applied to a certain purpose, the application of part of such proceeds to another and entirely different purpose, releases the surety. (*Crossley v. Stanley*, 321.)

4. **A SURETY IS ENTITLED TO CONTRIBUTION FOR COSTS AND EXPENSES IN DEFENDING A SUIT, INCLUDING COUNSEL FEES,** if the defense was prudent; and it must be so regarded when it greatly reduces the claim made against the surety. (*Connolly v. Dolan*, 816.)

See Guaranty; Officers, 6.

## TAXATION.

**1. TAXATION OF MORTGAGES HELD BY NONRESIDENTS.**—A state may tax all mortgages, or the interest stipulated for thereon, on land within the state, in the county where the land is situated, no matter whether such mortgages are owned by citizens of the state or by nonresident individuals or corporations. (*Allen v. National State Bank*, 517.)

**2. TAXATION—EXEMPTIONS—LAW LIBRARY.**—Under a statute exempting from taxation the library of every individual, a law library owned by an individual is exempt. (*Patterson v. Board of Review*, 562.)

**3. LICENSE TAX ON UNPROFITABLE BUSINESS.**—A privilege tax imposed upon sleeping and palace car companies for transporting passengers from one point to another within the state cannot be avoided by proving that such business is compulsory and done at a loss. (*Pullman Co. v. Adams*, 647.)

**4. HOMESTEADS—TAXATION.**—Land entered under the homestead laws of the United States is not subject to taxation until the right to a patent is perfected. (*Hoskins v. Illinois Cent. R. R. Co.*, 644.)

**5. TAXATION—TAX SALES.**—A STATUTE OF LIMITATIONS barring suits for land against persons holding under tax titles applies only to land taxable when sold for taxes. (*Hoskins v. Illinois Cent. R. R. Co.*, 644.)

**6. TAXATION—CORPORATIONS—SPECIAL LAWS.**—The LEGISLATURE may by special act impose specific taxes upon corporations, or it may authorize cities to do the same. (*Detroit etc. Ry. Co. v. Common Council*, 589.)

**7. TAXATION—STREET RAILWAY CORPORATIONS—CONTRACT WITH CITY.**—Where by charter a city is empowered to lay specific taxes upon street railway corporations, the city may make a contract with such corporations fixing the rate of city taxation which will be binding on the city and which will relieve such corporations from paying its share of the general tax for city purposes. (*Detroit etc. Ry. Co. v. Common Council*, 589.)

**8. TAXATION—IMMUNITY FROM—ASSIGNABILITY—STREET RAILWAYS.**—The right of immunity from general local taxation, which a street railway company has by reason of a contract with a city, is assignable under a statute allowing such corporations to purchase and use other street railways, and to enjoy all the rights and privileges of such companies, the same as they might have done. (*Detroit etc. Ry. Co. v. Common Council*, 589.)

**9. TAXATION—FRANCHISES—ASSESSMENT—MENTAL PROCESS.**—While an assessment placed on a naked street railway franchise, disassociated from the tangible personal property, and irrespective of the cash value of the whole, may be invalid, yet the mental processes by which the assessors ascertained the value of the plant are immaterial, if they finally concluded the property was honestly worth in cash the sum assessed. (*Detroit etc. Ry. Co. v. Common Council*, 589.)

**10. TAXATION—CONTESTING ASSESSMENT—WAIVING TECHNICALITIES.**—Where a street railway company contests its assessment before the board of assessors and, upon appeal, before the city council, upon the merits, it cannot, after an adverse decision, file a second appeal which sets up purely technical defenses. (*Detroit etc. Ry. Co. v. Common Council*, 589.)



**11. TAXATION—CORPORATIONS—FRANCHISES.**—The rights to organize, exist, and act generally as a corporation, while franchises, are not transferable and have no cash value within the meaning of the tax law. (Detroit etc. Ry. Co. v. Common Council, 589.)

**12. TAXATION—CORPORATIONS.—SPECIAL PRIVILEGES** granted to a corporation may have a cash value in connection with the tangible property with which they are used, within the meaning of the tax law. (Detroit etc. Ry. Co. v. Common Council, 589.)

**13. TAXATION.—THE GOODWILL OF A BUSINESS** is not taxable. (Detroit etc. Ry. Co. v. Common Council, 589.)

**14. TAXATION—STREET RAILWAYS—TRACKS.**—Under a statute providing that the track of a street railway company shall be assessed as personal property, the term "track" includes not only the ties, spikes, rails, and switches, but also the right to use the bed upon which they are placed. (Detroit etc. Ry. Co. v. Common Council, 589.)

**15. TAXATION—STREET RAILWAYS—ASSESSMENT AS UNIT—FRANCHISE.**—The tangible property of a street railway company may be assessed as a unit, and the location of its easement and tracks as to environment, and the period that it may lawfully use it, and other exceptional privileges inseparably connected with it, may be considered in determining the value of such property. (Detroit etc. Ry. Co. v. Common Council, 589.)

**16. TAXATION—STREET RAILWAYS—FRANCHISES—STATUTE.**—The franchise of a street railway company, although not made taxable property by express statute, may be taxed indirectly by associating it with tangible property, thereby increasing the valuation of the latter, since property should be taxed at its cash value, whatever it may be that causes the value. (Detroit etc. Ry. Co. v. Common Council, 589.)

**17. TAXATION—CORPORATIONS—DOUBLE TAXATION—CONSTITUTIONALITY.**—A statute relating to the assessment of corporations, which provides that the value of the stock less the real estate, and the cash value of all personal property less bona fide indebtedness, are assessable as personal property, is void as providing for double taxation, and as lacking uniformity with the usual method. (Detroit etc. Ry. Co. v. Common Council, 589.)

**18. TAXATION—CORPORATIONS—EFFECT OF UNCONSTITUTIONAL STATUTE.**—Where a statute, which provides especially for the assessment of corporations, is unconstitutional, corporate property is to be assessed according to the general provisions of law relating to the assessment of property. (Detroit etc. Ry. Co. v. Common Council, 589.)

**19. TAXATION—STREET RAILWAYS—TANGIBLE PROPERTY—EJUSDEM GENERIS.**—The fact that a statute provides for the taxation of tangible property alone will not, under the doctrine of ejusdem generis, prevent the taxation of tangible property to the amount of its enhanced value, where such value has been added by reason of its association, and use in connection with intangible property. (Detroit etc. Ry. Co. v. Common Council, 589.)

**20. TAXATION—STREET RAILWAYS—ASSESSMENT AS UNIT—DIFFERENT TAXING DISTRICTS.**—The fact that a street railway system has several power plants situated at different places along its line, which extends into several taxing districts, one of which is outside the city, with which the city board of assessors has nothing to do, is no obstacle in the way of an assessment of

such property as a unit, since the legislature has power to require different portions to be assessed in different places, and there is nothing to prevent a fair division of the value of the property by a mutual understanding between the several officers, if not in some other way. (Detroit etc. Ry. Co. v. Common Council, 589.)

**See Interstate Commerce; Vendor and Purchaser.**

#### TICKETS.

**See Railroads, 1, 2.**

#### TIMBER.

**See Trees.**

#### TOLLS.

**See Highways, 3.**

#### TORT.

**See Actions, 2.**

#### TOWNS.

**TOWNS—SHADE TREES IN STREET—REMOVAL—NOTICE TO PROPERTY OWNER.**—Where shade trees have been planted and maintained in the streets of a town by the abutting property owner, who owns to the center of the street, the town cannot cut down and remove such trees without previous notice to the abutting owner to remove them. (Stretch v. Cassopolis, 567.)

#### TRADEMARK.

**See Injunctions, 2.**

#### TREES.

**See Municipal Corporations, 11; Railroads, 8, 9; Towns.**

#### TRESPASS.

**TRESPASS—PRINCIPALS.**—In trespass all are principals and the act of one is the act of all. (Central of Georgia Ry. Co. v. Brown, 250.)

**See Pleading, 2.**

#### TRIAL.

**1. TRIAL—PRACTICE.**—It is error to expunge a reply stating matters of fact, consistent with the complaint, and sufficient, if true, to avoid the defense. (Fish v. Smith, 161.)

**2. TRIAL—PRACTICE.**—A defendant against whose objection an order for substituting a new plaintiff is made, as defendant claims, on insufficient evidence is entitled to the allowance of a proper bill of exceptions, but a refusal to sign such bill of exceptions is harmless if the question is raised and decided on the trial. (Fish v. Smith, 161.)

**3. TRIAL—SPECIAL VERDICT—WHAT IS NOT.**—A general verdict returned by a jury, with answers to interrogatories, is not a special verdict. (Consolidated Stone Co. v. Williams, 278.)

**See Pleading.**

**TROVER AND CONVERSION.**

1. **TROVER—CONVERSION.**—If the party making a demand for the possession of chattels is himself then in possession, and can remove it if he sees fit, the refusal of his demand does not constitute conversion sufficient to sustain an action of trover. (*Canning v. Owen*, 858.)

2. **CONVERSION—COLLATERAL SECURITIES—TRANSFER OF PROMISSORY NOTES.**—The payee of a negotiable promissory note, with whom other similar notes have been deposited as collateral security, may properly transfer such collateral security to one to whom he has assigned the principal note, and he is not liable to the depositor for a subsequent wrongful conversion of the collaterals by the transferee. (*Bank of Forsyth v. Davis*, 248.)

**TRUSTS.**

1. **TRUSTS—PASSIVE—USE OF GRANTOR.**—A trust created by deed to trustees, to hold during the lifetime of the grantor certain land and all rents, income, profits, and proceeds thereof, and the proceeds of any property sold or exchanged to the use of the grantor, and to sell and convey when directed by him to such person as he may direct, is a mere passive trust and void. (*Carpenter v. Cook*, 118.)

2. **TRUSTS, "TO SELL REAL ESTATE AND APPLY PROCEEDS** in accordance with the instrument creating the trust," to be valid under the statute, must impose an imperative duty upon the trustee, both to sell the property and to apply the proceeds by parting therewith according to the directions contained in the deed of trust. (*Carpenter v. Cook*, 118.)

3. **TRUSTS, "TO RECEIVE RENTS AND PROFITS OF REAL PROPERTY,** and pay them to, or apply them to, the use of any person," as provided by statute, imposes an active duty upon the trustee, to apply and distribute the rents and profits as directed by the deed creating the trust, and a mere passive trust to hold them for the use of the grantor is void. (*Carpenter v. Cook*, 118.)

4. **TRUSTS, TO HOLD PROPERTY,** do not constitute trusts to sell and dispose of the proceeds. (*Carpenter v. Cook*, 118.)

5. **TRUSTS, TO HOLD RENTS AND PROFITS** to the sole use of a certain person, are not trusts to receive rents and profits, and pay or apply them to any person. Such trusts are merely passive and void. (*Carpenter v. Cook*, 118.)

6. **TRUSTS—INTERVENING VALID AND INVALID PROVISIONS.**—If several trusts are so inextricably interwoven and mutually interdependent that the destruction of one maims and maims, in essential particulars, the trust scheme, the whole must fail. (*Carpenter v. Cook*, 118.)

7. **TRUSTS—ILLEGAL GIFT OF RESIDUE.**—A gift or trust of the "residue and remainder," after providing for an illegal primary trust, is void. If the primary trust is void, the trusts and limitations over must fail. (*Carpenter v. Cook*, 118.)

8. **TRUSTS AND USES—ESTATE VESTING IN BENEFICIARY—EXECUTION OF INVALID TRUST.**—Under the California statute of uses and trusts, no legal estate vests in the beneficiary, and under any view of such statute an invalid trust to convey cannot be deemed executed. The English statute of uses



being repugnant to, and inconsistent with, the whole system of conveyancing and registry in force in such state, is not in operation therein. (Estate of Fair, 70.)

9. TRUSTS IN WILLS—INVALID DEVISE IN TRUST TO CONVEY.—A trust created by will in trustees to transfer and convey real property to named beneficiaries is void, and cannot be construed as creating an estate in remainder in the beneficiaries in the absence of other words in the will, which, without the aid of the invalid trust, would devise any estate to such beneficiaries. (Estate of Fair, 70.)

10. TRUSTS UNDER WILLS—INVALID TRUST TO CONVEY—ESTATES IN REMAINDER.—Rules applicable to vested remainders, under valid devises, do not apply where there is no such devise, but only a trust to convey, vesting no present estate in the beneficiaries, who may be alive at the time contemplated for the conveyance under the trust, and who can acquire no right other than one to enforce the execution of such conveyance. (Estate of Fair, 70.)

11. TRUSTS.—POWER IN TRUST TO CONVEY is a trust to convey, within the meaning of the California statute of uses and trusts, and, not being within any category of valid trusts enumerated in such statute, is thereby forbidden and void. (Estate of Fair, 70.)

12. TRUSTS—SEPARATION OF VALID AND INVALID.—An invalid trust to convey to certain beneficiaries who shall be living at the time of the conveyance, after the expiration of a trust for the lives of the testator's children, carries with it the otherwise valid trust for the lives of such children, and renders the whole trust void. (Estate of Fair, 70.)

13. TRUSTS, WHAT FORBIDDEN.—An express trust to convey real property is, in California, void, because forbidden by its Civil Code. (Estate of Fair, 70.)

14. TRUSTS—POWER TO CREATE—VOID TRUST TO CONVEY.—The power conferred by statute upon the creator of a trust to "prescribe to whom the real property to which the trust relates shall belong in the event of the failure or termination of the trust," and to "transfer or devise such property subject to the execution of the trust," does not authorize a void trust to convey property to be transformed into a valid trust not otherwise in any manner expressed. (Estate of Fair, 70.)

15. TRUSTS—SEPARATION OF VOID AND VALID PROVISIONS.—If an estate is created subject to several trusts, one of which is void, and the other valid and legally separable from the other, the estate vests, unaffected by the void trust; but if the creation of the estate depends upon the execution of a void trust, it can never come into existence. (Estate of Fair, 70.)

See Wills.

## USURY.

1. USURY—INTENT TO VIOLATE LAW—PROCEDURE.—A CORRUPT INTENT is an element of usury in a contract for the loan of money, which means that the parties must have knowingly agreed upon a rate of interest greater than that allowed by law. Hence, where they have acted under an honest belief that the stipulated rate was recoverable under the law, in which they were mistaken, the penalties of usury will not be enforced, but the bor-

rower will be charged with his loan at the legal rate, and will be credited with what he has paid on account thereof. (Washington Investment Assn. v. Stanley, 793.)

2. USURY.—THE BURDEN OF PROVING that a transaction is infected with usury lies upon him who attacks it. (Wilkins v. Gibson, 204.)

3. USURY—PROOF OF.—A transaction is not shown to be usurious merely because the amount loaned is less than the debt secured. (Wilkins v. Gibson, 204.)

4. USURY—CONFLICT OF LAWS.—If, according to the real intent of the parties as disclosed by their contract, payment thereof is to be made within the state, its usury laws are applicable thereto, although the contract provides for its payment in another state. (Shannon v. Georgia etc. Assn., 657.)

5. USURY—FOREIGN CORPORATIONS—CONFLICT OF LAWS.—A building and loan association organized in one state and engaged in doing business in another, is permitted therein to charge no higher rate of interest than is chargeable under the laws of the latter state, and while, by the law of comity, the charter of such corporation is recognized as the law of its existence, yet if it employs the usual agencies to solicit and transact business in the latter state and contracts for the payment of premiums and interest in excess of the authorized rate, the transaction must be denounced as an attempted evasion of the laws of that state, whatever be the nominal rate specified or artifice adopted, and this though it be specifically provided that the contract is made with reference to the laws of another state. (Shannon v. Georgia etc. Assn., 657.)

6. USURY—FOREIGN CORPORATIONS—CONFLICT OF LAWS.—Foreign corporations wishing to do business other than that for which they are organized, and localizing that business therein through local boards, must comply with the law of the state. They cannot, under such circumstances, enforce there stipulations in contracts allowed by the law of the state of their creation, if such stipulations violate the laws and public policy of the other state. The law of the state of the creation of such corporations can have, *ex proprio vigore*, no extraterritorial effect, and the corporations whose business has been localized in another state and the borrower, or both, cannot abrogate, by attempted contract, stipulations whose purpose it is to evade the laws against usury. (Shannon v. Georgia etc. Assn., 657.)

7. USURY—FOREIGN CORPORATIONS—CONFLICT OF LAWS.—If a foreign money lending corporation has localized its business in another state through local boards, doing there continuously and regularly for several years the business of the corporation, it thus voluntarily domesticates itself within that state, and subjects its business and contracts to the operation of its laws, and if, from all the facts, it appears that the only purpose of stipulations in notes on mortgages for their payment in another state is to evade usury laws, no device, disguise, or contrivance resorted to for that purpose can be effective. (Shannon v. Georgia etc. Assn., 657.)

See Building and Loan Associations, 3; Subrogation, 11.

#### VARIANCE.

See Pleading, 10, 11.

**VENDOR AND VENDEE.****1. VENDOR AND VENDEE—VOLUNTEERS—TAX TITLES.—**

A grantee in a voluntary conveyance takes subject to all existing equities against his grantor, and cannot subsequently acquire the land at tax sale freed from such equities. (North American Trust Co. v. Lanier, 635.)

**2. VENDOR AND VENDEE—VOLUNTEERS—TITLE ACQUIRED AT TAX SALE.—**A party in possession as a mere volunteer by gift cannot defeat a vendor's lien, or a right of a mortgagee to an excess over the homestead in the land, by buying it at a tax sale, or from one who has bought it at such sale. (North American Trust Co. v. Lanier, 635.)

**VEUNE OF CRIME.**

See Criminal Law, 3.

**VERDICT.**

See Trial, 3.

**WAGES.**

See Exemptions.

**WAREHOUSEMEN.**

**1. WAREHOUSEMEN'S LIENS** do not give a right to retain goods in the warehouse for a balance of accounts relating to similar dealings. (Shingleur-Johnson & Co. v. Canton Cotton etc. Co., 655.)

**2. WAREHOUSEMEN'S LIENS — HOW LOST. —**A warehouseman's lien is specific or particular, attaching only upon each separate bailment, and is lost when the articles of each separate bailment are delivered to the bailor or his assignee, although the storage charges remain unpaid. (Shingleur-Johnson & Co. v. Canton Cotton etc. Co., 655.)

**3. WAREHOUSEMEN'S LIENS.—STATUTES GIVING LIENS UPON CROPS** to all who aid in their preparation for market or sale do not entitle warehousemen to liens on cotton in the bale and being handled in the market. (Shingleur-Johnson & Co. v. Canton Cotton etc. Co., 655.)

**4. WAREHOUSEMEN—RIGHT OF HOLDER OF RECEIPTS TO RECOVER GOODS.—**A purchaser of goods who holds the warehouse receipts issued therefor may maintain replevin against the warehouseman therefor, although such receipts are not indorsed by his vendor, and provide that the goods are to be delivered only on the receipts properly indorsed. (Shingleur-Johnson & Co. v. Canton Cotton etc. Co., 655.)

**5. BAILMENTS — COLD STORAGE — CARE REQUIRED.—**Bailees for hire who receive dressed poultry to be kept in "cold storage," and who keep the temperature of their room at the ordinary cold storage temperature, are not, in the absence of specific agreement, liable for a damaged condition of the poultry arising from the fact that the temperature of the cold storage room is too high to preserve it. In such case no duty rests upon the bailees to keep their room at the temperature of a "freezer." (Allen v. Somers, 158.)



**WATER RATES.**

**See Landlord and Tenant, 2**

**WATERS AND WATERCOURSES.**

**1. WATERS AND WATERCOURSES—ISLAND IN RIVER—ACCRETION AND RELICTION.**—If an island arises in a navigable river unconnected with the shore, the riparian owner has no title to such island although it is gradually added to by accretion or reliction until it is connected with the shore. (*Holman v. Hodges*, 367.)

**2. WATERS AND WATERCOURSES—ISLAND IN RIVER—TITLE TO—ACCRETION AND RELICTION.**—The owner of contiguous land is not the owner of an island that springs up in the midst of a navigable river, though it is on one side of the thread thereof. If by accretion to such island the water margin unites with the shore, the newly made land becomes part of the island and the riparian ownership is not extended. (*Holman v. Hodges*, 367.)

**3. WATER AND WATERCOURSES—ISLAND IN RIVER—ACCRETION AND RELICTION—TITLE TO.**—If an island springs up in a navigable stream, and by gradual reliction or accretion thereto it is finally joined to the mainland, the title to the whole of the land thus formed remains in the state. (*Holman v. Hodges*, 367.)

**4. WATER AND WATERCOURSES—ISLAND IN RIVER—TITLE TO.**—The title to an island arising in a navigable stream and never becoming a part of the government domain, remains in the state. (*Holman v. Hodges*, 367.)

**See Municipal Corporations, 7-10.**

**WILLS.**

**1. WILLS—CONSTRUCTION.**—In construing a will, technical informalities, or grammatical errors, or words which, in legal language, are inapt to express the evident intention of the testator, must be construed as though the proper legal phraseology had been employed; but there must be some language to effectuate that which a litigant claims to have been the intention of the testator. (*Estate of Fair*, 70.)

**2. WILLS—CONSTRUCTION—INTENTION OF TESTATOR.** In construing a will the intention of the testator must be found in the will itself, and is not to be collected by conjecture de hors the will. If the language of the instrument is unambiguous and perfectly clear, there is no field for the play of construction. If the testator has clearly expressed one intention, the court cannot impute to him another, but the intention must clearly appear to be lawful. The court can, in no instance, make a new will for the testator. (*Estate of Fair*, 70.)

**3. WILLS—SEPARATION OF VALID AND INVALID CLAUSES.**—If there are valid and invalid clauses in a will, the valid ones cannot stand if the invalid ones are so interwoven therewith that they cannot be eliminated without interfering with and changing the main scheme of the testator. (*Estate of Fair*, 70.)

**4. WILLS—CONSTRUCTION.**—If the language of the provisions of a will is plain and unambiguous, courts are not permitted to wrest it from its natural import in order to save it from con-

demnation. Courts cannot force the construction of a sentence, or even a word, in order that a particular result may be reached. (Estate of Fair, 70.)

5. **WILLS—CONSTRUCTION—EXPRESSED INTENT CANNOT BE CHANGED.**—The legal effect of the expressed intent of a testator in his will cannot be varied under the guise of correction, because he misapprehended its legal effect. If only an illegal mode of executing the intent is expressed, the court cannot substitute a legal mode. (Estate of Fair, 70.)

6. **WILLS—CONDITIONS IN RESTRAINT OF MARRIAGE.** A bequest or devise in restraint of a second marriage is valid. (Chapin v. Cooke, 139.)

7. **WILLS—CONDITIONS IN RESTRAINT OF MARRIAGE.** If a condition in a will in restraint of marriage is annexed to a legacy as a condition subsequent, the condition is valid if there is an express immediate gift over, and void if there is no such gift. (Chapin v. Cooke, 139.)

8. **WILLS—CONDITIONS IN RESTRAINT OF MARRIAGE.** If a testator directs the sale of all of his estate by will and the payment of one-half of the income to his widow during her life, or until she shall remarry, in lieu of dower, and the payment of the other half to certain relatives in specified proportions, and then provides that "on the death of my wife" the property is to be divided among said relatives, the interest of the widow in the estate, as well as in the trust created solely in her behalf, ceases upon her remarriage, and thereupon the legatees who take vested remainders in the shares given to them become entitled to a division of the entire estate. (Chapin v. Cooke, 139.)

9. **WILLS—CONSTRUCTION—TRUSTS.**—Whether there is in a will a direct grant of remainders, or a mere trust to convey at a future time, so that no estate is to vest until the execution of the conveyance, is to be determined by the intention of the testator as expressed in his will. (Estate of Fair, 70.)

10. **WILLS—TRUSTS DISINHERITING CHILDREN.**—The law does not favor the tying up of vast estates by will for a long period by trusts or schemes which include the disinheritance of the testator's children. (Estate of Fair, 70.)

11. **WILLS—VESTED LEGACIES.**—Legacies "to be given to my grandsons, or to the survivor or survivors of them, at such times as my executors may find convenient and in accordance with their best judgment, but in no case before they or either of them shall have reached the age of twenty-one years," are vested. The direction as to time of payment relates to the enjoyment and not to the time of vesting. (Webb v. Webb, 499.)

12. **WILLS—VESTED LEGACIES.**—Any bequest to a person in esse, unless there is some clearly expressed desire or manifest reason for suspending or deferring the time of vesting, confers an immediate vested interest, although the time of enjoyment may be postponed. (Webb v. Webb, 499.)

13. **WILLS—LEGACIES—INTEREST.**—If the testator stands in loco parentis to the legatee, and the latter is otherwise unprovided for, interest is allowed upon the legacy from the death of the testator, although a future time is fixed for its payment. (Webb v. Webb, 499.)

14. **WILLS—LEGACIES.—EVIDENCE OF INTENTION** on the part of a testator to stand in loco parentis to his legatee may be

**found upon the face of the will, from the nature of its provisions, or in the conduct of the testator, and in the circumstances surrounding them and the beneficiary. (Webb v. Webb, 499.)**

**15. WILLS—LEGACIES—INTEREST.**—If a testator places himself in loco parentis to his legatee by paying a sum weekly or otherwise for his support, who is otherwise without support, interest is payable upon his death on the legacy, although it is made payable to the legatee upon his attaining a specified age. (Webb v. Webb, 499.)

**16. WILLS — CONTINGENT LEGACIES—INTEREST.**—A bequest of legacies to beneficiaries named, "who may live to reach the age of twenty-one years," creates contingent legacies, which do not begin to draw interest until the happening of the condition upon which they are predicated. (Webb v. Webb, 499.)

**17. WILLS—LOST—PRESUMPTION.**—Where a will is lost or destroyed, the presumption is that it was revoked by the testator. This presumption can be rebutted only by proof that the loss or destruction was subsequent to the testator's death, or without his consent. (Scott v. Maddox, 263.)

**18. WILLS—LOST—PROOF—EVIDENCE.—THE EXECUTION** of a lost will must be proved by the subscribing witnesses, but its contents, its loss or destruction, and the facts necessary to rebut the presumption of revocation by the testator may be shown by any other competent evidence. (Scott v. Maddox, 263.)

**19. WILLS—LOST—PROOF OF DESTRUCTION.—MERE OPPORTUNITY** to destroy a will on the part of persons interested in establishing intestacy is not sufficient to rebut the presumption that the testator destroyed it for the purpose of revocation. (Scott v. Maddox, 263.)

**20. WILLS—PROOF OF DESTRUCTION.—DECLARATIONS OF AN HEIR** of the testator, who is not a party to the record, that he destroyed the will after the testator's death, are merely hearsay and not admissible as against other persons interested in the case. (Scott v. Maddox, 263.)

## WITNESSES.

**WITNESSES—OPINION AS TO STRENGTH OF ROPE—COMPETENCY.**—When an employé, a "derrick boss" in a stone quarry, sues his employer for personal injuries caused by the breaking of a defective rope connected with the derrick, while it was being lowered, a witness who states that he is familiar with the quarry business and the handling of derricks, and that he had personal knowledge of the particular rope which broke and caused the plaintiff's injury, is competent, without a showing of his skill or experience in the making of ropes, to give an opinion as to whether the particular rope in question was strong enough for the use to which it was put in lowering the particular derrick. (Consolidated Stone Co. v. Williams, 278.)

**See Evidence; Husband and Wife, 3, 4.**











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